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

Decision

Matter of: Bulova Technologies, Inc; Department of the Army--Reconsideration

File: B-243446.4; B-243446.5

Date: February 5, 1992

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Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requests for reconsideration of prior decision sustaining protest and recommending that the agency reinstate the award unless it determines under its contract administration authority to terminate the contract for reasons other than flaws in the original solicitation are denied where the requests by the agency and interested party fail to demonstrate any factual or legal errors in the prior decision which warrant its reversal.

DECISION

Bulova Technologies, Inc. and the Department of the Army request reconsideration of our decision in Rexon Technology Corp.; Bulova Technologies, Inc., B-243446.2; B-243446.3, Sept. 20, 1991, 91-2 CPD ¶ 262. In that decision, we sustained Rexon's protest under request for proposals (RFP) No. DAAA09-90-R-0874, issued by the U.S. Army Armament, Munitions and Chemical Command (AMCCOM) for fuzes and safety and arming modules. We concluded that the agency's decision to terminate for convenience a contract awarded to Rexon was improper because while we recognized that certain provisions contained in the RFP were defective, the record failed to establish any reasonable possibility that any offeror was prejudiced by the award.

We deny the requests for reconsideration.

The solicitation, issued October 9, 1990, as amended, included a Performance Incentive Contracting (PIC) provision that provided for a preference to be given offerors for

quality and on-time delivery and established a number of criteria that an offeror had to meet to qualify for the preference. Once qualified, an offeror was given a 10-percent preference over nonqualified offerors.

Four offers were received by the closing date of December 21, 1990. Rexon was low with a price of $11,459,233.93, and Bulova was second low with a price of $12,378,406.16. Both Rexon and Bulova applied for the PIC preference and a PIC evaluation was performed. Bulova was found qualified for the PIC program while Rexon initially was found not qualified. It was determined that Rexon, as required by the program, did not have a quality rating of at least 90 under the Contractor Performance Certification Program. Rexon was found to have a score of 84.8 on the relevant contracts.

In accordance with the RFP PIC provision, Rexon challenged the Army's adverse determination. The Army reconsidered its conclusion that Rexon's past quality did not meet PIC standards and revised the ratings on three contracts, which resulted in raising Rexon's overall rating to a qualifying 90.8. Since Rexon and Bulova were both PIC qualified, on March 20, 1991, Rexon was awarded the contract.

On March 28, 1991, Bulova protested the award to our Office and challenged the PIC status of Rexon. In response to that protest, the Army again reviewed Rexon's PIC evaluation and discovered that there were many inconsistencies between the intent of the PIC provision, the evaluation performed, and the actual language of the provision. The Army concluded that depending on how the PIC provision was interpreted, Rexon may or may not be PIC qualified. Since the PIC provision provided for the addition of a 10-percent evaluation factor to the low evaluated offer if the offeror is not PIC qualified, Bulova would be the low evaluated offeror if only Bulova were PIC qualified and Rexon were not.

Consequently, on April 22, the Army terminated for convenience the contract with Rexon because of the ambiguities and inconsistencies contained in the solicitation evaluation provisions. On April 29, our Office dismissed Bulova's protest as academic and premature. On April 26, Rexon filed an agency-level protest against the termination for convenience, which was denied by the Army by letter of May 10. Rexon subsequently filed a protest with our Office on May 14.

On June 14, the Army decided to cancel the solicitation and resolicit for the requirement. The new solicitation, issued on July 9, increased the basic funded quantities, again restricted the solicitation to the mobilization base, and changed the evaluation plan by removing the PIC provision.

The solicitation also stated that the agency could make up to two awards. On June 28, Bulova protested the cancellation and resolicitation.

Rexon, in its protest, argued that it was the low bidder with or without the PIC preference and consequently any ambiguities in the PIC provision did not justify the termination of its contract. Bulova, on the other hand, argued that the cancellation of the RFP and resolicitation was improper because the PIC provision was not ambiguous and Bulova was entitled to receive award of the contract under the canceled RFP. Bulova argued that Rexon could not qualify under any interpretation of the PIC criteria and since Bulova did qualify, Bulova should have been awarded the contract under the original RFP.

We sustained Rexon's protest and denied Bulova's protest. We agreed with the Army that the PIC provision was subject to several reasonable interpretations and, depending on how the provision was interpreted, Rexon may or may not be PIC qualified. We also found that there was another unclear aspect of the PIC provision which called into question Bulova's PIC eligibility. While we agreed that the PIC provision was defective, we determined that the record failed to establish any reasonable possibility of prejudice to the parties as a result of that defect which would warrant the corrective action taken by the Army. Under the PIC provision, the Army was to determine, after submission of offers, whether a contractor met the PIC criteria based on historical past performance data. The identity and PIC status of competitors were not revealed until after award. Consequently, we concluded that any ambiguity in the PIC provision did not affect how an offeror structured its proposal, since an offeror did not know prior to submitting its offer whether or not it or any other potential competitor was PIC qualified. Since no firm, in submitting an offer, was certain of its entitlement to the evaluation preference, no firm could reasonably rely on receiving the preference. Moreover, Bulova, in its protest, did not argue that it would have structured its offer differently had it known the PIC provision would not apply or that it would not be considered PIC qualified. Since Rexon submitted the low, technically acceptable offer under the original solicitation and the Army did not contend, nor did the record show, that the elimination of the PIC provision would materially affect the field of competition, since the procurement was at all times limited to mobilization base producers, we found that award under the original solicitation would meet the Army's need and there was no evidence that any offeror was prejudiced by an award under the initial solicitation based solely on low prices.

Although the Army provided in the resolicitation for the possibility of two awards for mobilization base purposes, the record showed this to have been an issue that arose after the decision to terminate Rexon's contract and resolicit. The agency specifically stated that the award to Rexon was terminated because the PIC provisions were ambiguous. The agency did not state that this possibility of two awards was an independent basis for termination and resolicitation, but rather stated it was a factor which mitigates the adverse effect of a possible auction.[1] On that basis, we specifically stated that to the extent the Army might propose to terminate for convenience Rexon's contract in order to satisfy a need to maintain more than one mobilization base producer, our decision did not address the propriety of that action. We found that the termination of Rexon's contract based on flaws in the original award was improper and since resolicitation would simply promote an auction among the offerors without any corresponding benefit to the procurement system, we found that termination of the award and resolicitation were not justified.

The Army and Bulova in their requests for reconsideration challenge our finding that the defects in the PIC provisions did not result in any reasonable possibility of prejudice to offerors. Bulova maintains that it, and quite likely other offerors, based the pricing of their proposals on the anticipated application of the PIC criteria. The Army further maintains that its belief that Bulova might have been prejudiced justified the termination of Rexon's contract.

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[1]The Army did state that "the solicitation has been brought under the mobilization base program with a possibility of two awards instead of one," and argued that this change alone would justify cancellation. We found that this issue arose after the decision to terminate Rexon's contract and resolicit, and we did not find that this factor had been an independent basis for the termination and resolicitation. We see no basis to change our view. Further, the record does not show that two awards are required by the agency. There was no written documentation in the original record to support the agency's contention that multiple awards to maintain two warm bases was based on legitimate mobilization base needs. See Federal Acquisition Regulation (FAR) § 6.302-3 (FAC 90-8). The reconsideration request does not contain such documentation. Moreover, in the revised solicitation, the agency did not state that it intended to make multiple awards, but merely reserved the right to make one or two awards, "whichever is most advantageous to the government."

These arguments were fully addressed in our prior decision. As previously stated, the very nature of the PIC provisions precluded offerors from structuring their proposals on the basis of those provisions. The PIC criteria was based on historical past performance data, and required agency evaluation of each firm's past performance to determine PIC eligibility, including the agency's interpretation of what constituted on-time delivery to calculate an on-time delivery rate. Moreover, the PIC eligibility requirements were found ambiguous by our Office. We remain convinced that no offeror could be certain when it prepared its proposal whether it would itself receive the PIC preference or whether any potential competitors would receive the preference. While Bulova maintains that it had some information about Rexon's poor performance in hand which it believed demonstrated that Rexon could not be PIC qualified and also believed that its own performance on relevant contracts was more than adequate to satisfy the PIC criteria, Bulova does not argue that its pricing decision for its offer was based on the application of the PIC criteria. Bulova instead argues that because "the factor could have and should have played a role in the preparation of price proposals," the competition was prejudiced by the award to Rexon. As we stated in our decision, there was nothing in the record to establish that any offeror was prejudiced by the award to Rexon. We find entirely speculative the contention that any firm reasonably could predict which firms could be PIC qualified based on such a clearly ambiguous provision and unverified information about the competitor.[2] In our view, there is no new information presented by Bulova and the Army in their reconsideration

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[2]Where it is clear from a solicitation provision that the field of competition is limited to one firm, an offeror that reasonably relies on the restriction in formulating its proposal may be prejudiced when the restriction is improperly waived. Deknatel Div., Pfizer Hosp. Prods. Group, Inc., B-243408, July 29, 1991, 91-2 CPD ¶ 97. In our view, however, firms that mistakenly judge their competition or unreasonably contend that they relied on a solicitation restriction are not prejudiced by a waiver of that restriction. Kollmorgen Corp.--Recon., B-242602.2, Aug. 21, 1991, 91-2 CPD ¶ 183. Additionally, in MTS Sys. Corp., B-238137, Apr. 27, 1990, 90-1 CPD ¶ 434, a case cited by the Army, a protester alleged that it would have offered a lower price had the solicitation not contained a restriction, later improperly waived by the agency. We found sufficient prejudice in that case because of the additional possibility that other firms would have submitted offers had the restriction been omitted from the solicitation. There is no evidence of that possibility in this case. See also Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384.

request to establish that there was any reasonable possibility of prejudice to the competition by the award based solely on low prices.

Bulova and the Army also argue that even if the need to restructure the mobilization base did not surface until after Rexon's contract was terminated, it is still a valid reason to terminate, cancel and resolicit. As previously stated, the record showed that the Army terminated Rexon's contract because of the ambiguities in the PIC provision. The record showed that the decision to provide for the possibility of two awards for mobilization base purposes arose after the decision to terminate Rexon's contract and resolicit. Our jurisdiction extends to reviewing the reasonableness of the termination for convenience decision based on an improper initial award, and we found that the termination of Rexon's contract based on flaws in the original award was improper. In our decision, we specifically acknowledged that it is the agency's responsibility to determine its needs and recommended that the Army reinstate the award to Rexon unless it determines under its contract administration authority to terminate the contract for reasons other than flaws in the original solicitation.

Since the Army and Bulova have not demonstrated any errors of law or fact warranting reversal or modification of our decision, the requests for reconsideration are denied.

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