



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pacific Consolidated Industries
File: B-250136.5
Date: March 22, 1994

Robert E. Little, Jr., Esq., Fenwick & West, for the protester.
Louis D. Victorino, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Guild Associates, Inc., an interested party.
Colonel Riggs L. Wilks, Jr., and Captain Elizabeth D. Berrigan, Department of the Army, for the agency.
Paul E. Jordan, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation of bias is denied where the record contains no credible evidence that agency acted with specific intent to injure the protester.
2. Solicitation which provides for production of items in two phases, the second of which will not be initiated unless government testing validates government-furnished technical data package (TDP), is sufficient to advise prospective offerors of risk involved in use of TDP that is not yet proven.

DECISION

Pacific Consolidated Industries (PCI) protests the award of a contract to Guild Associates, Inc. under request for proposals (RFP) No. DAMD-17-92-R-2036, issued by the Department of the Army for 113 field medical oxygen generating and distribution systems. PCI contends that the procurement was designed to favor Guild, the development contractor, by failing to disclose sufficient information to all prospective offerors.

We deny the protest.

BACKGROUND

A field medical oxygen generating and distribution system produces medical-grade oxygen for use in military field hospitals and is designed to eliminate the need to transport oxygen cylinders necessary for hospital operations and

patient evacuation, Guild and another contractor produced prototype systems under contracts awarded in 1985. After testing, Guild was selected to further develop the system and the Army approved the required operational capability requirements for the system in 1988. In 1989, the Army awarded Guild a follow-on contract under which Guild constructed, documented, tested, and delivered five systems. The Army tested these units from May 1990 through September 1991. When the Guild prototypes did not meet all specifications, the Army and Guild developed various modifications to resolve the problems. Instead of continuing the Guild development effort, in 1992, the Army decided to begin production based on a technical data package (TDP) which incorporated the developed solutions. On August 14, 1992, the Army issued the subject RFP.

The RFP contemplated performance in two phases. Phase I, a cost-reimbursement effort, was to include production of three units to be delivered 9 months after contract award for testing by the government to validate the TDP. If testing verified that the delivered systems met testing goals, then Phase II, a fixed-price full-scale production effort, would commence. Phase II called for delivery of the remaining 110 units over 5 years. The RFP provided that the contractor was to perform first article testing on the first two systems completed during Phase II. Offerors were advised that all systems were to be produced in accordance with the government-approved TDP and any modifications to it resulting from engineering change proposals or requests for deviations or waivers. Offerors also were required to propose a modification of the refrigerant to be used in the system compressor components.

Technical factors, including technical approach, facilities, corporate experience, personnel experience, regulatory affairs experience, management interest, and design refinement (refrigerant modification) were more important than cost and price. Award was to be made to the offeror whose proposal represented the best value to the government.

Five offerors submitted proposals. After an initial evaluation, the Army included the proposals of PCI, Guild and Airsep Corporation in the competitive range, conducted discussions, and obtained best and final offers (BAFO) from all three. Based on a subsequent review, the Army decided to award the contract to Guild. However, after PCI filed a protest challenging the award, the contracting officer reopened discussions with the competitive range offerors and solicited second BAFOs. In its evaluation of the BAFOs, the Army increased the score of each proposal, but none changed relative position. Guild's proposal was ranked first technically with a score of 3,564 out of a possible 3,690 points; Airsep's proposal was ranked second

with a score of 2,963; and PCI's proposal was third with a score of 2,899. Guild's proposed cost/price (\$34,454,602.65) was highest while PCI's proposed cost/price was the second highest. Airsep proposed the lowest combined cost/price. Although Guild's proposed cost/price was more than \$2 million higher than either of the other proposals, the Army found the price differences not to be significant in view of the technical superiority of Guild's proposal. Accordingly, the Army awarded the contract to Guild.¹

DISCUSSION

In its initial protest submission, PCI contended that the agency was not justified in awarding the contract to Guild at a cost premium of more than \$2 million. According to PCI, since the RFP contained a "build-to-print" specification and all offerors had similar production skills, Guild's technical advantage would be minimal at best. PCI also argued that Guild's alleged poor past performance should have resulted in a lower evaluation score for Guild.

In its report responding to the protest, the Army explained that the solicitation requirements were not so simple as to preclude major differences among proposals; that Guild's superior performance on the development contract justified its past performance rating; and that the technical superiority of Guild's proposal justified the award to it at a higher cost/price than that proposed by PCI. In its comments to the report, PCI did not dispute the agency's conclusions.² Instead, it changed the focus of its

¹Airsep also filed a protest with our Office, but withdrew it after reviewing the agency's report.

²Accordingly, we have treated these issues as abandoned. See Telephonics Corp., B-246016, Jan. 30, 1992, 92-1 CPD ¶ 130. In any event, PCI is not an interested party to protest the agency's evaluation of Guild's proposal or the Army's cost/technical trade-off. PCI's proposal was the lowest rated technically and, as we explain below, we have no basis to dispute that rating. In addition, PCI's proposal included the second highest cost/price. Airsep's proposal was higher rated technically than PCI's and included a lower cost/price. Since Airsep would be in line for award if we sustained PCI's protest concerning the evaluation of Guild's proposal and the cost/technical tradeoff, and PCI has not challenged the evaluation of Airsep's proposal, PCI lacks the requisite direct and substantial interest with regard to the award to be considered an interested party. Kaiserslautern Maintenance Group, B-240067, Oct. 12, 1990, 90-2 CPD ¶ 288.

protest, claiming bias against PCI through misevaluation of its proposal and bias in favor of Guild through misrepresentations concerning the development effort and the TDP. Before we will find bias, there must be very strong proof than an agency has a specific intent to injure a protester. Hill's Capitol Sec., Inc., B-250983, Mar. 2, 1993, 93-1 CPD ¶ 190. Here, the record contains no such showing.

First, we find no evidence of bias against PCI. PCI alleges that the agency ignored its past experience, failed to understand PCI's production schedule and thus its man-hour loads, and improperly scored its proposal on an item which was to be evaluated on a pass-fail basis. Based upon our review of the record, we find no evidence of any misevaluation and consequently, no evidence of bias. For example, the RFP required offerors to propose a replacement for the specified R-12 refrigerant and advised that it was to be evaluated on a pass-fail basis. In fact, PCI's proposal was evaluated on that basis and found technically acceptable. However, the evaluators also noted that PCI did not propose to test its replacement refrigerant prior to use in the system. The evaluators concluded that this could have an impact on delivery of the production units and assigned PCI's proposal a less than perfect score under the technical approach factor. We find nothing improper in this evaluation. While PCI had proposed an acceptable refrigerant modification, the evaluators reasonably considered the lack of testing as an issue under the technical approach factor. PCI's criticisms of the evaluation simply reflect its disagreement with the agency's judgment, which does not itself render the evaluation unreasonable. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115. The evaluation provides no evidence of an intent to injure PCI. Hill's Capitol Sec., Inc., *supra*.

Second, we find no evidence of bias favoring Guild. While Guild's familiarity with the system development provided it with an advantage, there was nothing unfair about that advantage. An agency is not required to equalize competition with respect to the advantages that a firm may have by virtue of its incumbency so long as the advantages do not result from preferential or unfair action by the government. Bendix Field Eng'g Corp., B-241156, Jan. 16, 1991, 91-1 CPD ¶ 44.

PCI also argues that the agency's bias is demonstrated by an alleged misrepresentation that the TDP would produce a system meeting all specifications. PCI relies on the Army's answer to a preproposal conference question concerning whether Guild had received final approval that its prototypes met all specifications. In response, the Army stated that Guild had received final approval that the systems

delivered met all of the contract requirements. The Army explains that it did not intend to mislead offerors; it meant that Guild had satisfactorily completed its contract to produce prototypes, not that the prototypes met all system specifications.

While PCI contends that the Army's response was misleading, it admits that it is technically true. Further, in the context of this procurement, we do not believe the response was prejudicially misleading as PCI contends. The RFP made plain that the TDP required validation and that successful user testing was a prerequisite to Phase II. Further, in response to another preproposal question, the Army advised all offerors that the TDP contained "all government approved system modifications that have resulted from [testing]." Thus, offerors were on notice that the TDP was changed as a result of tests on the Guild prototypes and was not proven. Accordingly, while we believe the agency could have been clearer in its response at the preproposal conference, we do not believe that the response is evidence of bias. Hill's Capitol Sec., Inc., supra.

Notwithstanding notice that the TDP contained modifications, PCI expresses surprise that the TDP had not yet been proven through tests. According to PCI, it now realizes that building the required system according to the TDP will not guarantee that the system will meet the specifications, and if the Phase I units do not meet the specifications, the Army will not initiate full-scale production under Phase II. PCI states that, when it submitted its proposal, it believed that, with the single exception of the refrigerant problem, the agency was representing that items built according to the TDP would meet all performance requirements. Thus, PCI states that it understood the purpose of Phase I of the contract, including low-rate production and validation of the TDP, to be an opportunity for the government to ensure that the contractor can perform according to the specifications. As a result, PCI claims that had it known of these matters from the beginning, it would not have submitted a proposal.³ Essentially, PCI is arguing that it

³In a related argument, PCI contends that it would not have submitted a proposal had it realized that the competition was not for a potential 113 units, but rather "a production contract for 3 units that the agency's record shows will not work." We disagree with PCI's assessment of the record. According to the agency, the major problem areas after final testing of the prototypes were the oxygen compressors and the required times between failures. Guild isolated and proposed a solution to eliminate the problems and laboratory testing of the compressors indicates that these problems are
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was unaware of the risk involved in performing this contract and that its protest should be sustained because it was misled into competing when it had no chance for award.

Risks are inherent in procurements, and an agency may properly impose substantial risk on the contractor and minimal risk upon itself. Essex Electro Eng'rs, Inc., 72 Comp. Gen. 299 (1993), 93-2 CPD ¶ 141. There is no legal requirement that a solicitation eliminate all performance uncertainties; such perfection, while desirable, is manifestly impractical in some procurements, and the mere presence of risk does not render a solicitation improper. AAA Eng'g & Drafting, Inc., B-236034, Oct. 31, 1989, 89-2 CPD ¶ 404. Thus, offerors are reasonably expected to use their professional expertise and business judgment in anticipating risks and computing their offers. J & J Maintenance, Inc., B-244366, Oct. 15, 1991, 91-2 CPD ¶ 333. In this regard, an agency must provide sufficiently detailed information, either through the solicitation or otherwise, to enable offerors to compete intelligently, and on relatively equal terms. Hero, Inc., 63 Comp. Gen. 117 (1983), 83-2 CPD ¶ 687; International Resources Corp., B-248050.3, Feb. 16, 1993, 93-1 CPD ¶ 138.

Here, we find the RFP provided sufficiently detailed information to allow offerors to understand the risks involved and to compete intelligently and on a relatively equal basis. Guild and the Army had developed solutions for all identified problems and these were incorporated into the TDP furnished to all offerors for preparation of proposals.⁴ While the Army believed the modifications to the TDP would result in a system that met all specifications, absent further government testing, the agency did not know whether the solutions would be successful. Thus, the RFP provided for the two-phase production schedule with the second phase contingent on successful completion of the validation testing at the end of Phase I. PCI, however, contends that it believed "validation" of the TDP simply meant that the government was "looking only for internal inconsistencies in the [TDP] and

³(...continued)

solved. Other minor problems concerning items such as changing switch positions, signs, and warning labels and technical documentation errors made up the remainder of the modifications. While the systems built by Guild have not performed to all specifications, there is no reason to conclude that they "will not work."

⁴In fact, an amendment to the RFP advised offerors that, based on the outcome of government tests, modifications had been included in the TDP.

fabrication in compliance with practices appropriate to the system." In view of the RFP's description of the production scheme, PCI's belief was unreasonable.

First, the RFP provided for a low rate of production (three units in 9 months) for government testing and evaluation. Second, it provided for validation of all system technical publications, and validation of the complete system TDP. Third, it advised that "[i]f testing verifies the system meets the testing goals, then the [system] will transition to full Production and Deployment and continuation into Phase II of this contract will follow." Further, first article testing for acceptance of production models was not based on these initial tests, but rather was part of Phase II. In view of the risk that Phase II would not be implemented, the agency provided for payment in Phase I on a cost-reimbursement basis in an apparent effort to ameliorate the cost aspects of that risk. Overall, the stated production scheme was sufficient to place all prudent contractors on notice that success in Phase I was not guaranteed and that the TDP, not merely the contractor's ability, was to be validated.

The protest is denied.

Robert P. Murphy
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Acting General Counsel