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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Power Connector, Inc.

File: B-404916.2

Date: August 15, 2011

James J. McCullough, Esq., and Michael J. Anstett, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for the protester.

Christine M. Ciccotti, Esq., Department of Justice, Federal Prison Industries, Inc., for the agency.

Charles W. Morrow, Esq., Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where, in response to an earlier protest, the agency took corrective action by amending the solicitation to change a material requirement under its past performance evaluation scheme, but improperly precluded offerors from making revisions to all aspects of their proposals, including price.

DECISION

Power Connector, Inc., of Bohemia, New York, protests the corrective action undertaken by the Department of Justice, Federal Prison Industries, Inc. (UNICOR) in response to its earlier protest (B-404916), which challenged the award of a contract to Newberger Brothers, Inc., of Chicago, Illinois under request for proposals (RFP) No. CT2038-11, for leather fabric. Power Connector argues that the RFP amendment issued by the agency as part of its corrective action resulted in a material change to the RFP's past performance criteria, but improperly and unreasonably limited offerors' opportunity to submit revised proposals.

We sustain the protest.

BACKGROUND

UNICOR uses production facilities located in correctional institutions operated by the Federal Bureau of Prisons to produce various goods and services for government agencies. As relevant here, the National Park Service and General Services

Administration enter into contracts with UNICOR for the provision of leather gloves. The RFP was issued on December 17, 2010, under the commercial item acquisition procedures of Federal Acquisition Regulation (FAR) Part 12, and sought to procure 4,000,000 square feet of leather for use in producing gloves. The RFP anticipated award of an indefinite-quantity/indefinite-delivery fixed-price contract, with fixed unit prices, for a base year and 2 option years.

The RFP provided for award on a best-value basis based on three equally weighted evaluation factors: past performance, ability to meet specifications, and price. For evaluation of past performance, the RFP in relevant part stated:

FPI 999.999-9, Business Management Questionnaire – This must be completed and provided with your offer. This is very important as it provides your past performance for like or similar items and capability to perform the requirement.

RFP at 13. The instructions on the form stated:

Offerors submit recent and relevant information concerning contracts and subcontracts (Federal, State, local government or private) which demonstrates their ability to perform the proposed effort.

RFP at 16. The original solicitation did not contain a specific time frame to define “recent” contracts.

Six offerors, including Power Connector and Newberger, submitted proposals in response to the RFP by the January 19, 2011, closing date. UNICOR conducted discussions with each offeror. The agency’s discussions with Power Connector addressed the protester’s past performance references. Power Connector had identified three active contracts with UNICOR for electronics items, and five contracts with UNICOR, completed between 1994 and 1999, for leather. During the discussions, the agency advised Power Connector that for evaluation purposes the agency would only accept contracts for “like or similar item[s]” that are “currently being provided or provided within the last three years.” Agency Report (AR), Tab 5, E-mail from Agency to Protester Regarding Discussions (Feb. 16, 2011, 10:53 a.m.). The agency also advised that although the agency was seeking contract references for provision of leather, “[n]ot having a ‘like item’ contract within the last three years doesn’t exclude you from the solicitation process, [because] we evaluate price, past performance, and product specs.” Id. (Feb. 16, 2011, 12:56 p.m.). Following discussions, Power Connector submitted three additional contracts for provision of leather that were being performed by its proposed joint venture partner.

On March 16, UNICOR selected Newberger’s proposal for award, based on its past performance ratings of “good” to “excellent,” and its lowest-proposed price of [DELETED]. AR, Tab 9, Power Connector Debriefing, at 1. In its debriefing for the

protester, UNICOR stated that Power Connector's proposal did not merit award because it proposed the second-lowest price of [DELETED], and its past performance ratings were merely "good." Id. In this regard, the agency stated that the protester did not provide past performance for like or similar items, and thus received no evaluation credit for its contracts with UNICOR for provision of electronics. The agency also stated that Power Connector's proposed joint venture partner provided past performance information involving contracts for provision of leather to UNICOR that were rated good. Id.; see also Contracting Officer (CO) Statement at 2.

On March 22, Power Connector filed a protest with our Office challenging the award to Newberger. On April 14, the agency advised our Office that it would take corrective action by canceling the award to Newberger, issuing a revised solicitation, and seeking revised proposals; based on this notice, we dismissed the protest.

On April 26, UNICOR issued amendment No. 0006. As relevant here, the amendment revised the criteria for the evaluation of past performance, and provided additional information concerning the evaluation of offerors' bid samples in connection with the ability to meet specifications factor. With regard to past performance, amendment No. 0006 stated that relevant past performance was defined as "providing leather items," and recent performance was defined as "completed in the last 5 years." RFP amend. 6 at 1; see also id. at 5, revised form FPI 999.999-9. The amendment advised offerors that "[a]ll pricing proposals have already been submitted, and will be utilized to conduct the evaluation of offers for award" and that "[n]o new pricing proposals are requested." Id.

DISCUSSION

Power Connector argues that RFP amendment No. 6 materially changed the past performance evaluation criteria, but also improperly precludes offerors from revising other aspects of their proposals, such as price. The protester states that in light of the changed past performance criteria, it would revise its price.

In negotiated procurements, CO's have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. Intermarkets Global, B-400660.10, B-400660.11, Feb. 2, 2011, 2011 CPD ¶ 30 at 3. An agency's discretion in the area of corrective action extends to deciding the scope of proposal revisions, and there are circumstances where an agency may reasonably decide to limit revisions offerors make to their proposals. See, e.g., Computer Assocs. Int'l, Inc., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 5. However, where an agency amends a solicitation and permits offerors to revise their proposals, our Office has held that offerors should be permitted to revise any aspect of their proposals--including those that were not the subject of the amendment--unless the agency demonstrates that the amendment could not reasonably have an effect on other aspects of the proposals, or that

allowing such revisions would have a detrimental impact on the competitive process. Cooperative Muratori Riuniti, B-294980.5, July 27, 2005, 2005 CPD ¶ 144 at 7; Lockheed Martin Sys. Integration-Owego; Sikorsky Aircraft Co., B-299145.5, B-299145.6, Aug. 30, 2007, 2007 CPD ¶ 155 at 5.

UNICOR cites three bases for limiting the extent to which proposals may be revised. As discussed below, we conclude that none of these arguments provide a reasonable basis for limiting offerors' proposal revisions to the area of past performance.

First, UNICOR contends that amendment No. 0006 did not make a material change to the RFP's evaluation criteria, but instead merely clarified the requirement for recent and relevant past performance information. In our view, however, the amendment did more than clarify the past performance factor. As noted above, the amendment changed the evaluation factor by defining relevant and recent contracts as those for leather items that were completed by the offeror in the last 5 years. This revised evaluation scheme is clearly different from the scheme set forth in the original RFP, which did not limit relevant performance to providing leather items, and which did not contain a specific time frame for evaluation.¹ We conclude that the amendment made a material change to the evaluation scheme, because the depth and quality of past performance contract experience that would be rated favorably was changed. Cf. Mantech Advanced Sys., Int'l, Inc., B-240136, Oct. 26, 1990, 90-2 CPD ¶ 336 at 5 (relaxation of level of experience for one offeror resulted in the waiver of a material solicitation requirement).

Next, UNICOR argues that even if the solicitation revision materially revised the past performance evaluation criteria, that revision would not effect other areas of the offerors' proposals. With regard to Power Connector, the agency contends that the protester was aware that the agency did not view the contracts it submitted as relevant or recent as a result of discussions, and thus its revised proposal, submitted in response to discussions, should have already accounted for this understanding in its revised past performance proposal. For this reason, the agency argues that the protester could not have been prejudiced by the lack of an opportunity to revise its price in response to RFP amendment No. 6. We are not persuaded by this argument.

¹ As set forth above, the original solicitation did not contain a specific time frame to define "recent" contracts for the past performance review. We note for the record that the CO advised Power Connector during discussions that it would consider only contracts for leather items currently being provided or completed within the last 3 years. Amendment No. 6 established the time frame for relevant past performance as 5 years.

The record shows that although the agency requested that the protester provide more recent contracts for provision of leather, the agency did not advise the protester that its contract for providing electronics to UNICOR would be discounted, entirely. See AR, Tab 5, Emails from Agency to Protester Regarding Discussions. Additionally, the record does not show that the agency provided the protester with an opportunity to revise its price in response to the agency's request for revised past performance information during discussions.² Power Connector asserts that, had it known that its successful past and current performance on UNICOR contracts would not count toward its past performance rating, it would have lowered its price in order to enhance the competitiveness of its proposal. Protest at 14. The protester further states that it will lower its price in response to the amended solicitation if the restriction is removed. Id. On this record, we think the protester demonstrates that the revision to the evaluation criteria would have an effect on its proposed price.

Finally, UNICOR argues that it limited offerors' ability to submit revised prices in response to RFP amendment No. 6 in order to prevent harm to the competitive process. In this regard, the CO states that the debriefing provided to Power Connector after the award erroneously provided Power Connector with the prices of the other offerors. CO Statement at 2. The CO states that this disclosure was in error because "I provided more information tha[n] the FAR authorized me to release, including the prices submitted in response to the solicitation by all the offerors, not just the awardee's price." Id.

UNICOR argues that by limiting offerors' proposal revisions to past performance, the agency neutralized the competitive advantage that Power Connector gained from learning the other offerors' prices. We are not persuaded by this argument. As the protester notes, the FAR instructs that when an agency issues a new solicitation in

² The record is unclear as to whether UNICOR permitted Power Connector to revise its price during discussions. The protester states that it provided a revised price in response to discussions. Protest at 6. However, neither the contemporaneous record, nor the agency's response to the protest, discuss a request for revised pricing; instead, the record indicates that the protester was provided only an opportunity to revise its past performance information. See AR at 6-7; CO Statement at 2-3; AR, Tab 5, E-mails from Agency to Protester Regarding Discussions. Even if Power Connector had been provided an opportunity to submit a revised price during discussions, we think that the protester would still be prejudiced by the agency's decision to limit proposal revisions during the corrective action. In this regard, as discussed above, UNICOR did not expressly advise that the agency would not give any weight or consideration to Power Connector's performance of contracts for the provision of electronics. For this reason, we think that the protester reasonably demonstrates that its price proposal would change in response to the revised evaluation criteria in RFP amendment No. 6.

response to a protest, the agency should provide to offerors in the competitive range from whom revised proposals are sought any “[i]nformation provided to unsuccessful offerors in any debriefings conducted on the original award regarding the successful offeror’s proposal.” FAR § 15.507(b)(2), (c)(1). In light of the FAR requirement to equalize the disclosure of information, we think that the agency’s decision to limit the scope of revisions to address its concern regarding the information disclosed to Power Connector was unreasonable. Instead, consistent with FAR § 15.507, we think that the agency should remedy the concern regarding unequal disclosures of information by advising all offerors of the pricing information.³ See Norvar Health Servs.--Protest and Reconsideration, B-286253.2 et al., Dec. 8, 2000, 2000 CPD ¶ 204 at 5 (FAR § 15.507 requires agencies to provide information provided to unsuccessful offerors during debriefing to all competitive range offerors upon recompetition arising from corrective action).

CONCLUSION AND RECOMMENDATION

We find that the agency’s amendment made a material change to the solicitation’s evaluation criteria. UNICOR does not address whether the revision to the past performance factor would affect the ability to meet specifications evaluation factor. The protester states that, if given the opportunity, it would revise its proposed price to reflect changes in its past performance references; the protester does not, however, address any changes to the ability to meet specifications factor. As discussed above, the general rule is that offerors should be permitted to revise all aspects of their proposal, absent a reasonable basis proffered by the agency for limiting revisions. In light of the agency’s lack of a reasonable basis to limit proposal revisions, and in light of the protester’s clear statement that it would revise its price proposal, we think that offerors should be allowed to revise any aspect of their proposals in response to the revised solicitation.

³ UNICOR also argues that the disclosure of the other offerors’ prices resulted in an unequal access to information organizational conflict of interest (OCI). AR at 7. As our Office has held, however, an unequal access OCI exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm a competitive advantage in a later competition for a government contract. FAR §§ 9.505(b), 9.505-4; CapRock Gov’t Solutions, Inc. et al, B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 25. Here, the disclosure was made to the protester by the agency as part of a debriefing, rather than performance of a government contract. For this reason, we do not think that the circumstances here constitute an unequal access OCI, nor do they provide the agency a reasonable basis for limiting offerors’ ability to submit revised proposals.

We recommend that UNICOR amend the solicitation to permit offerors to revise all aspects of their proposals, including price. We also recommend that Power Connector be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d) (1) (2011). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel