



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Noelke GmbH

File: B-278324.2

Date: February 9, 1998

Reed L. von Maur, Esq., David L. Krakow, Esq., and John B. Anderson, Esq., Parker, Poe, Adams & Bernstein, for the protester.

Laura Smith, Esq., Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that agency improperly canceled solicitation and resolicited as corrective action in response to an earlier meritorious protest is denied where the record shows that the protester was not entitled to award under the earlier solicitation, and where the agency reasonably concluded that the specification overstated the government's needs and the agency might achieve greater competition by resoliciting. Contention that disclosure of prices under the original solicitation barred the agency from canceling and resoliciting without a compelling reason is also denied since neither option-cancellation nor reevaluation of revised proposals--placed the protester in any worse position vis-à-vis other offerors.

DECISION

Noelke GmbH protests the corrective action taken by the Department of the Army, Corps of Engineers in response to its earlier protest challenging award of a contract to SKE GmbH, pursuant to request for proposals (RFP) No. DACA90-97-R-0060, seeking offers for the renovation of two buildings located at Kleber Kaserne, Kaiserslautern, Germany. Noelke argues that, rather than terminating SKE's award and resoliciting for these services, the agency should have made award to Noelke as the offeror with the lowest proposed price under the RFP.

We deny the protest.

BACKGROUND

On October 8, 1997, shortly after learning of award to SKE, Noelke filed a protest with our Office arguing that the evaluation of proposals and the resulting price/technical trade-off--the Army concluded that SKE's higher-rated, higher-priced offer presented the best value to the government--were unreasonable. Prior to submitting the agency report, the Army advised our Office that it was taking

corrective action by terminating the awardee's contract and resoliciting for the needed services. Specifically, the letter stated that "[a]mong the deficiencies found in the procurement, the [a]gency's records reflected errors in the reading and subsequently the scoring of the proposals, and as such, the propriety of the agency's cost-tech trade off is questionable." Army Request for Dismissal, Oct. 22, 1997, at 1. Our Office subsequently dismissed Noelke's initial protest as academic.

On October 31, Noelke filed its current protest with our Office challenging the Army's proposed corrective action. Noelke argues that the Army should have made award to it under the RFP, and that the agency's decision to resolicit for these renovation services is unreasonable.

In the agency report filed on November 22 in response to Noelke's current protest, the Army's justification of its decision to cancel and resolicit does not rely upon the same reasons identified in its above-referenced dismissal request. Instead, the Army explains that cancellation and resolicitation are appropriate because: the evaluation scheme was misleading, did not accurately reflect the agency's priorities, and no longer reflects the agency's needs; the specifications were ambiguous and inaccurate; and circumstances suggest that there may be a significantly broader competition now than was achieved under the earlier solicitation.

At the time the Army submitted its agency report here, it had not issued the revised solicitation. On December 4, the new solicitation (RFP No. DACA90-98-R-0007) was issued, including new evaluation criteria, and on December 23, the Army issued amendment 0001 to the new solicitation, revising the new solicitation's evaluation scheme. At each juncture, Noelke has been permitted to file supplemental comments on the Army's actions.

DISCUSSION

With respect to Noelke's initial argument--that it is entitled to award as a result of the corrective action taken in response to its earlier protest--Noelke's complaint misstates the appropriate remedy available under these circumstances. Although the Army agreed with Noelke's general contentions that the evaluation and resulting price/technical trade-off were flawed, we have no basis to assume that under a proper evaluation, Noelke would have won the competition. Noelke's claim that it was entitled to award as the responsible offeror which submitted the lowest-priced, "responsive" proposal, overlooks the fact that this was a best value procurement, and that the RFP advised offerors that the agency was "more concerned with obtaining superior technical or management features than with making an award at the lowest overall cost to the Government." RFP No. DACA90-97-R-0060, Amend. 0001 at 00100-7. Thus, Noelke is not entitled to award as a result of the agency's corrective action decision. See Anderson Hickey Co., B-250045.3, July 13, 1993, 93-2 CPD ¶ 15 at 3.

Noelke next contends that the agency could not reasonably cancel this solicitation and resolicit for the services.¹ Specifically, Noelke argues that: (1) none of the reasons given in the agency's request for dismissal of the prior protest adequately support its cancellation decision; (2) our Office should reject the reasons stated in the Army's agency report filed in answer to this protest in favor of the reasons stated by the Army in its earlier dismissal request; and (3) the reasons stated by the Army in its agency report are insufficient to justify its cancellation decision.

With respect to Noelke's contention that the Army should be held to its initial justifications for its cancellation decision, the Army argues that its request for dismissal of the earlier protest is not dispositive here, and that our Office should instead review the materials provided in the agency report submitted in response to the instant protest. We agree. The reasons justifying the cancellation set forth in the agency report here can be used so long as they would have been proper support for the determination to cancel at the time that decision was made. Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995, 95-1 CPD ¶ 73 at 5.

Turning to the justifications for the cancellation decision in the agency report, Noelke argues that none of the proffered reasons are sufficient to support the agency action. Noelke also contends that our Office should hold the agency to a higher standard of review than usually applies to cancellation of a negotiated procurement because prices have been disclosed.²

As a general rule, in a negotiated procurement the contracting agency need only demonstrate a reasonable basis to cancel a solicitation after receipt of proposals, as opposed to the "compelling reason" required to cancel an invitation for bids (IFB) where the bids have been opened. Federal Acquisition Regulation § 14.404-1(a)(1); see CFM Equip. Co.--Recon., B-251344.2, Aug. 30, 1993, 93-2 CPD ¶ 134 at 3. The standards differ because, in procurements using sealed bids, competitive positions are exposed as a result of the public opening of bids, while in negotiated procurements there is no public opening. CFM Equip. Co.--Recon., supra.

In situations like this one, our Office has stated that cancellation of an RFP, even after one or more of the offerors' prices have been revealed, is proper where the

¹Where, as here, an agency terminates a contract and resolicits, it is in effect canceling the RFP, and we will determine the propriety of the agency action applying the rules pertaining to the cancellation of a solicitation. Switlik Parachute Co., Inc., B-275539, Mar. 3, 1997, 97-1 CPD ¶ 113 at 2 n.1.

²The awardee's price was disclosed at the time of the earlier protest. Noelke claims that the Army has disclosed its price during this protest. The Army admits that it provided a copy of Noelke's protest filing--which contained the company's price, but was not marked by Noelke's counsel as protected--to the awardee.

record contains plausible evidence or a reasonable possibility that a decision not to cancel would be prejudicial to the government or the integrity of the procurement system. Budney Indus., B-252361, June 10, 1993, 93-1 CPD ¶ 450 at 3-4. Here, for the reasons below, we conclude that the cancellation is justified, and we are not persuaded that any harm caused by the release of prices outweighs the government's interest in canceling this solicitation and beginning anew.

Despite Noelke's assertions, the Army's choice here is not between award to Noelke and resolicitation. As explained above, the circumstances of this procurement do not provide Noelke a right to award. Instead, the focus of our review must be limited to the propriety of the decision to cancel and resolicit versus amending the original RFP, requesting revised best and final offers (BAFO), and reevaluating. At this juncture, the disclosure of prices prior to the revision of the solicitation does not mitigate in favor of either approach--cancellation or reevaluation. Simply put, Noelke's position under the Army's current approach is no different than it would be if the agency had asked for revised BAFOs and reevaluated. Anderson Hickey Co., *supra*, at 4 n.3.

With respect to its decision to cancel, the agency identifies 12 separate examples where it believes the revised specifications have been modified to more accurately reflect the agency's needs, and argues that competition may be broadened as a result. For example, in several cases, the Army clarified the application of certain German statutes to the construction work anticipated here. Noelke's arguments that the statutes in question would have applied in any event, and the Army's reasonable and persuasive responses to the contrary, suggest that without specific direction in this area, the construction could have become bogged down in dispute over the application of these statutes. In our view, this clarification alone provides a reasonable basis to cancel and resolicit for these services.

We also see nothing unreasonable in the Army's contention that the passage of time, together with the above-mentioned clarifications, may result in a significant increase in competition. Specifically, the Army explains that the original solicitation was issued in August when many German employees take extended vacations, and the agency expects that interest in the current solicitation may be significantly higher now. As evidence of this possibility, the Army notes that only seven firms requested copies of the original RFP, and only three offers were received. To date, 16 firms have requested and received the revised solicitation. In our view, the possibility of increased competition (and the lower prices which often result) provides a reasonable basis to cancel this solicitation. Chant Eng'g Co., Inc., B-270149.2, Feb. 14, 1996, 96-1 CPD ¶ 96 at 2; FRC Int'l, Inc., B-260078, Apr. 10, 1995, 95-1 CPD ¶ 189 at 2.

As a final matter, we note that much of Noelke's protest appears premised on the assumption that the Army is acting in bad faith in canceling this solicitation. We find no support for this allegation in the record. Given that Noelke has offered no

basis for our Office to conclude that the Army is acting in bad faith here, we will not do so. See Brisk Waterproofing Co., Inc., B-256138.3, June 30, 1994, 94-1 CPD ¶ 394 at 5.

The protest is denied.

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