



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: LBM Inc.

File: B-286271

Date: December 1, 2000

Frank Moody for the protester.

Mitzi S. Phalen, Esq., Department of the Navy, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation requirement that contractor must be registered pursuant to ISO-9000 quality assurance standards reasonably reflects the agency's needs where contract performance will include transportation of hazardous materials, ordnance, aviation parts, components and aircraft, and where failure to properly perform such activities could result in personal injury and/or damage to equipment, vehicles and aircraft.

2. In solicitation issued in anticipation of cost comparison pursuant to Office of Management and Budget Circular No. A-76, agency may not exclude private-sector proposals solely on the basis that an offeror has not, at the time proposals are submitted, obtained ISO-9000 registration.

DECISION

LBM Inc. protests the provisions of request for proposals (RFP) No. N00421-00-R-0498 to provide transportation services at the Naval Aviation Depot (NADEP) in Cherry Point, North Carolina.¹ This solicitation was issued in anticipation of a cost comparison, pursuant to Office of Management and Budget (OMB) Circular No. A-76, between the private-sector proposal offering the best value to the government and the government's most efficient organization (MEO). Among other things, the solicitation required that an offeror be registered pursuant to

¹ The NADEP is an industrial facility that reworks, repairs, and overhauls aircraft, engines, and components for customers, both U.S. and foreign military. RFP, Performance Work Statement (PWS), § C-1.1.

ISO-9000 standards prior to submitting a proposal.² LBM protests that the solicitation's ISO-9000 requirements are inappropriate in that they are overly restrictive of competition and exceed the agency's actual needs.

Following the agency's corrective action which rendered moot certain portions of LBM's protest, we deny the remaining protest issues.

The solicitation at issue was published on August 31, 2000 and contemplates award of a fixed-price contract for a base period and four 1-year option periods. In anticipation of an A-76 cost comparison, the solicitation seeks private-sector proposals to perform various transportation related services, including: movement of aircraft, aircraft parts, components and materials within the NADEP and the surrounding area; refueling and defueling aircraft; forklift and lowboy services; transportation of visiting dignitaries; and equipment maintenance and administrative services. RFP, PWS, § C-5.

As initially issued, the solicitation also stated:

The offeror shall address its possession of ISO-9001 (1994), ISO-9002 (1994), or ISO-9001 (2000) registration from a Registrar accredited by the American National Standards Institute Registration Accreditation Board (ANSI-RAB) for services required under the PWS. A copy of the offeror's "ISO-9000 Certificate of Compliance" and a letter signed by the offeror certifying that it is currently ISO-9001 (1994), ISO-9002 (1994), or ISO-9001 (2000) registered must be provided in this tab.

Note: The ISO-9000 registration will not be subject to a qualitative rating evaluation or risk assessment. The ISO-9000 registration shall be evaluated on a Pass/Fail basis only. Failure to provide the required proof of ISO-9000 registration by the time set for receipt of proposals will result in the offeror being rated "Unsatisfactory" for the entire Technical Approach factor contained in Section M. The offeror will thereby be ineligible for award and excluded from the competitive range, should discussions be held and one established.

RFP at 76.

The closing date for submission of proposals was October 18, 2000. By protest dated September 13, LBM challenged the above-quoted solicitation requirements regarding

² ISO-9000 standards are a series of internationally recognized quality assurance standards established by the International Standards Organization (ISO). To become registered, a company's procedures are reviewed for compliance with the standards by an independently accredited registrar.

ISO-9000 registration.³ The agency subsequently extended the closing date for submission of proposals to December 18, 2000.

LBM first protests that any provision requiring a private-sector offeror to obtain ISO-9000 registration is overly restrictive and exceeds the agency's actual needs. Among other things, LBM argues that the registration requirement is excessive because LBM maintains it has previously performed other, similar contracts, without meeting this requirement and the services involved are "not of a highly technical nature." Protester Comments, Oct. 25, 2000, at 2-3.

The determination of a contracting agency's needs and the best method for accommodating them are matters primarily within the agency's discretion. Systems Application & Techs., Inc., B-270672, Apr. 8, 1996, 96-1 CPD ¶ 182 at 3. However, where a protester challenges a specification as unduly restrictive of competition, we will review the record to determine whether the restrictions imposed are reasonably related to the agency's needs. Id. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. R.R. Mongeau Eng'rs, Inc., B-218356, B-218357, July 8, 1985, 85-2 CPD ¶ 29 at 2.

Here, in response to LBM's protest, the agency explains that the requirement that a private-sector offeror obtain ISO-9000 registration ensures that the entity performing the required activities will have certain minimum quality assurance procedures in place during contract performance.⁴ The agency elaborates that such quality assurance requirements are necessitated by the particular type of activities contemplated by this solicitation, including: loading, offloading and transporting hazardous materials, ordnance, aviation parts, components and aircraft, and notes that failure to properly perform these activities could result in personal injury and/or damage to equipment, vehicles and aircraft. Agency Report at 16-17. Finally, the agency explains that requiring a contractor to comply with the ISO-9000 registration requirements will decrease the level of resources the government must expend to inspect and monitor contract performance. Id. at 12.

³ LBM also protested that the solicitation did not include the clause contained in FAR § 52.222.42, "Statement of Equivalent Rates for Federal Hires." LBM inquired about the agency's failure to include this clause during a site visit LBM attended on September 9; in response, the agency directed LBM to submit its concerns in writing. In its report responding to the protest, the agency acknowledged that this clause should have been included in the solicitation and amended the solicitation accordingly. RFP amend. 2.

⁴ The agency states that the entire NADEP at Cherry Point obtained ISO-9002 registration in November 1999.

LBM's comments responding to the agency report, while continuing to express disagreement with the agency's judgments, do not challenge the agency's description of the type of activities to be performed, nor the agency's representation that failure to properly perform the contract requirements could result in personal injury and/or damage to equipment, vehicles and aircraft. On this record, we find no basis to question the reasonableness of requiring that the contractor meet the ISO-9000 registration requirement by the time performance of the activities--on which the agency specifically relies to justify this requirement--actually begins. Thus, to the extent LBM asserts that any requirement that a private-sector contractor possess ISO-9000 registration exceeds the agency's actual needs, the protest is denied.

LBM's protest also challenged the point in time at which the solicitation required that ISO-9000 registration be obtained--that is, prior to submission of proposals. Noting that LBM "[is] presently in the process of obtaining the ISO registration," Protester Comments, Oct. 25, 2000, at 3, LBM argued that there was no reasonable basis for refusing to consider the proposal of an offeror simply because it had not actually completed that effort by the solicitation closing date, and questions the reasonableness of requiring offerors to obtain the certification well before contract performance will actually begin.

An agency's otherwise legitimate requirements regarding an offeror's demonstrated ability to meet contract requirements may not generally be applied at a point in time prior to when such qualifications become relevant--in this case, prior to actual contract performance. See Container Prods. Corp., B-280603.2, Nov. 4, 1998, 98-2 CPD ¶ 106 at 3-4. Here, the agency's conclusive determination that an offeror would not be capable of meeting the contract requirements, based solely on the fact that it had not obtained the necessary certification prior to submitting a proposal, would unreasonably exclude potential offerors. Id. This is particularly true in the context of an A-76 cost comparison, where the time between submission of private-sector proposals and actual commencement of the contract activities may be substantial.⁵

⁵ We note that the OMB Circular A-76 Revised Supplemental Handbook specifically contemplates a situation in which the entity selected to perform the competed activities is unable to perform. The Handbook states:

If, after contract start, the cost comparison "winner" is found to be unresponsive or otherwise unable to perform, the Government should seek a reaffirmation of bids received from the in-house, private sector and ISSA, as appropriate, to the cost comparison solicitation. Adjustments, limited to time delays or inflation, should be accommodated for all offerors. The [Cost Comparison Form] is then recalculated and award made to the next lowest bidder.

OMB Circular A-76 Revised Supplemental Handbook, Part 1, Ch. 3 § J.4.

In light of the exclusionary effect of the solicitation requirement that ISO-9000 registration be obtained prior to proposal submission--and consistent with our Office's commitment to undertake alternative dispute resolution (ADR) in cases where candid discussions, with all protest parties participating, may facilitate early dispute resolution--our Office conducted a telephone conference call with LBM and agency counsel during which various matters, including the timing of the ISO-9000 requirement, were discussed.

Following this ADR conference, the agency advised our Office and LBM that it was amending the solicitation to eliminate the requirement that an offeror must obtain ISO-9000 registration as a prerequisite to submitting an acceptable proposal. Instead, the amendment provides that the agency will perform a risk analysis and comparative evaluation of offerors' proposals in this area. Agency Supp. Report, Nov. 13, 2000, at 4-7; RFP amend. 3.⁶

Although LBM continues to assert that the agency's corrective action is inadequate, complaining that the agency may still eliminate LBM's proposal from the competition, we view this objection as premature. In the event LBM submits a proposal which is rejected by the agency, and LBM believes that such rejection is inappropriate, LBM may, consistent with applicable statute and regulations, challenge the agency's actions at that time.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel

⁶ We understand this solicitation amendment to provide that, although the agency will still require that offerors obtain ISO-9000 registration prior to actually beginning contract performance, and will require offerors' proposals to address this requirement, the agency will perform a risk analysis regarding an offeror's likelihood of meeting that requirement, see Canadian Commercial Corp./Polaris Inflatable Boats (Canada), Ltd., B-276945, July 31, 1997, 97-2 CPD ¶ 48 at 6-7 (agency reasonably evaluated risk associated with offeror's ability to comply with contract performance requirements), and, in addition, will comparatively evaluate proposals in this regard. See Davies Rail & Mechanical Works Inc., B-283911.2, Mar. 6, 2000, 2000 CPD ¶ 48 at 8 (in evaluating technical proposals, agency reasonably distinguished between proposal of offeror who had demonstrated prior successful use of ISO-9000 quality control program and proposal of offeror who had just obtained ISO-9000 certification).