



Decision

Matter of: Pond Security Group Italia JV–Costs

File: B-400149.2

Date: March 19, 2009

Paul Reinsdorf, Esq., Reinsdorf & Associates, for the protester.
Major William J. Nelson, Department of the Army, for the agency.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency's contention that protester was not prejudiced by solicitation defect (and protest thus was not clearly meritorious for purposes of determining whether reimbursement of protest costs is appropriate) because protester failed to submit a compliant proposal even after the solicitation was amended to address the protested defect is without merit since prejudice in the context of a protest alleging a solicitation defect is not based on post-protest developments, but rather on whether the alleged defect affected the protester's ability to compete at the time the protest was pending.

DECISION

Pond Security Group Italia JV requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest of request for proposals (RFP) No. W912PF-08-R-0015, issued by the Department of the Army for security guard services at Army garrison locations in Italy.

We grant the request.

The agency issued the RFP on April 8, 2008, seeking a contractor to provide security guard services at Army garrison locations in Vicenza and Livorno, Italy. According to the agency, for purposes of contracting and business practices in Italy, the U.S. government is treated as a commercial enterprise and must ensure that its actions conform to Italian requirements. Therefore, many of the contracts awarded by the agency in Italy contain unique requirements dictated by the Italian government. In this case, the RFP required offerors to submit with their initial proposals certain specified Italian permits, licenses, and certifications. Offerors were cautioned that

“[f]ailure to submit with the proposal any . . . required documents/certificates will be cause for rejection of the initial proposal” RFP at 14.

Pond, a joint venture consisting of three providers of security guard services and one provider of security guard training and administrative services, filed a protest with our Office on May 8, 2008, asserting that the RFP was unclear and failed to provide sufficient information to allow offerors to intelligently prepare their proposals. The protest largely concerned the RFP’s requirement that offerors submit an Italian “Chamber of Commerce Certificate of Membership.” As relevant here, the RFP stated that “[t]he offeror shall provide with the proposal a copy **certified** and **NOT** older than six (6) months at the time set forth for the receipt of the offer of the Chamber of Commerce Certificate of Membership (Certificato di Iscrizione alla Camera di Commercio/Albo Provinciale Della Imprese Vigilanza Privata).” *Id.* The provision also stated that “[i]n the case of a Joint Venture (RAGGRUPPAMENTO TEMPORANEO D’IMPRESE), each of the proposed partners must submit the documentation.” *Id.*

Pond first alleged that the requirement was unclear due to the use of Italian language terms without translation. Specifically, Pond argued that the term “Albo Provinciale Della Imprese Vigilanza Privata,” which it roughly translated to “provincial register of private security company,” had no apparent meaning that could be ascertained after inquiry at the Italian Chamber of Commerce. Protest at 6. Pond was particularly concerned that the reference to a “provincial register of private security company,” coupled with the requirement that all members of a joint venture submit the required certification, could indicate that the agency intended each member of a joint venture to possess Chamber of Commerce registration as a security company. Pond alleged that such a requirement was unnecessary under Italian law, contrary to Italian commercial practice, and unduly restrictive of competition, and could not be met by the member company of the Pond joint venture that was not a security provider, but a provider of training and administrative services. Pond also asserted that, in any event, even if each of its component companies were in position to supply a certification as a security guard company, it was impossible to provide a certification in the form called for in the RFP.

The agency responded that the Italian language portions of the certification requirement were statements of Italian legal “terms of art,” the English translations of which were essentially irrelevant, and that the Chamber of Commerce Certificate could be “provided by the ‘Albo Provinciale della impresa Vigilanza Privata,’ which is the research arm of the Chamber of Commerce.” Agency Report, Legal Memorandum at 8. The agency also confirmed, however, that it did intend for each member company in a joint venture to be licensed to provide security services in the prefectures in which services were to be provided, which the agency believed was mandatory in accordance with Italian T.U.L.P.S. [commercial practice regulations] Article 134. After receiving this response, Pond argued that a license to provide security services in accordance with T.U.L.P.S. Article 134 was a new, additional requirement that went beyond the language contained in the RFP, and that the

agency's need to clarify its intention underscored that the terms of the RFP were unclear.

In order to confirm whether the agency interpreted the Chamber of Commerce Certificate requirement in the RFP to consist of one or two distinct licenses or certificates, our Office requested that the agency provide a supplemental response on that issue. The Army's response acknowledged that "[t]here has apparently been some confusion over the exact nature of the requirements," and stated that the agency interpreted the Chamber of Commerce Certificate requirement in the RFP to consist of two separate Italian administrative requirements: a Chamber of Commerce Certificate providing general recognition of the company's right to conduct business, and an Article 134 license to perform physical security services issued by the local prefecture's office in the province where the services are to be provided. Agency Supplemental Report at 1-2.

On July 22, 2008, the GAO attorney responsible for the protest held an "outcome prediction" alternative dispute resolution (ADR) telephone conference with the parties and indicated that the protest was likely to be sustained, although not on all grounds.¹ Specifically, he stated that a written decision by our Office was likely to conclude that the agency's use of Italian language terms in the RFP was unobjectionable, that we probably would not express a view regarding the agency's interpretation of the requirements of Italian law, but that we likely would find that the requirement for each company in a joint venture to submit an Italian T.U.L.P.S. Article 134 security license with the initial proposal, in addition to the Chamber of Commerce Certificate of Membership, was not sufficiently clear from the terms of the RFP. In response to the conference call, the agency reopened the competition and issued an amendment that clarified the need for Article 134 licensing from the local prefecture. The agency also agreed to allow offerors to restructure their organizations as necessary to comply with the clarified requirements.

On August 8, Pond submitted a revised proposal that removed its proposed training and administrative services provider from the joint venture. However, Pond failed to submit with that proposal the Article 134 licenses for the three security firms remaining in the joint venture. Accordingly, the agency did not consider Pond's proposal, and award was made to another firm. Pond filed a protest of that award decision with our Office, which was denied. Pond now requests the costs of filing and pursuing its initial protest of the terms of the RFP.

Where an agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the circumstances of

¹ In outcome prediction ADR, the GAO attorney handling the case convenes all of the participating parties, usually by teleconference, and advises them of what he or she believes the likely outcome will be and the reasons for that belief.

the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2008); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4; Carl Zeiss, Inc.--Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 at 4. We generally do not consider corrective action to be prompt if it is taken after the due date for the agency report responding to the protest. See CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Here, the agency argues that Pond should not be reimbursed its costs because its protest was not clearly meritorious. A clearly meritorious protest is one that clearly would have been successful—that is, it must involve a matter over which we have jurisdiction and be filed by an interested party in a timely manner and otherwise comply with the requirements of our Bid Protest Regulations, and the record must establish that the agency prejudicially violated a procurement statute or regulation. Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 9. The agency argues that Pond's protest was not clearly meritorious because Pond was not prejudiced by the ambiguity in the RFP, since, when subsequently given the opportunity to do so, Pond failed to provide the Article 134 licenses with its revised proposal. We disagree.

The question of prejudice in the context of a protest challenging the terms of a solicitation concerns whether the alleged defect affects the protester's ability to compete under the solicitation. See Global Solutions Network, Inc., B-298682, Nov. 27, 2006, 2006 CPD ¶ 179 at 3. Prejudice thus is measured in light of the circumstances while the protest is pending, not, as the agency argues, by post-protest developments. Here, at the time the initial protest was filed and while it was pending, the RFP's failure to clearly state the agency's requirements with regard to the Italian licensing requirements prejudiced Pond's ability to prepare an offer on a common basis with other potential offerors, in response to the agency's actual needs. The fact that Pond subsequently did not submit the required licenses, even after the RFP was amended to clarify the agency's requirements, is not relevant to determining the question of prejudice in the context of the initial protest here.²

The agency also argues that the protest was not clearly meritorious because the Article 134 licenses are required by Italian law in order for any company to receive

² While Pond does not explain why it did not include the licenses with its revised proposal, Pond states that all the members of the joint venture hold an Article 134 license. Protester's Comments, Sept. 12, 2008, at 3.

award of the contract, and thus it was not necessary to set out the requirement in the RFP. Again, we disagree. Our view that the RFP was defective was not based on an interpretation of the requirements of Italian law in this area. On the contrary, the record before us indicated that there were multiple interpretations of those requirements as they relate to the specific issue in the protest—whether each member of a joint venture had to submit an Article 134 license. In our view, the RFP was defective because it did not clearly express the requirement (based on the agency’s interpretation of Italian law) that all member companies in a joint venture submit Article 134 licenses as part of the joint venture’s initial proposal, or risk rejection of the proposal. See RFP at 14.

In sum, we conclude that a reasonable inquiry by the agency into Pond’s initial protest would have revealed that the RFP was unclear regarding the requirements for the Chamber of Commerce Certificate and Article 134 license and, thus, by failing to act before the due date for the agency report, the agency unduly delayed taking corrective action. Accordingly, we recommend that the agency reimburse Pond for the reasonable costs of filing and pursuing its initial protest of the terms of the RFP. Pond should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the Army within 60 days of receipt of this decision.

Gary L. Kepplinger
General Counsel