



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: PCA Aerospace, Inc.

File: B-293042.3

Date: February 17, 2004

Michael L. Steele, Esq., for the protester.

Maj. Jacqueline B. Posner, Department of the Air Force, for the agency.

Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of corrective action taken in response to a post-award protest–reopening discussions, reevaluating proposals and making new award determination–is denied where widely disparate pricing among offerors reasonably led agency to conclude that instructions regarding pricing may have confused offerors.

DECISION

PCA Aerospace, Inc. protests the decision by the Department of the Air Force to terminate its contract awarded under solicitation No. F09603-03-R-22453, reopen discussions to clarify pricing, and conduct a new evaluation and new source selection decision based on the new offers. The Air Force's action was in response to two protests challenging the award on a number of grounds, which led the agency to conclude that its instructions regarding pricing may have caused confusion among offerors. PCA asserts that the Air Force lacks a reasonable basis for the corrective action because the instructions provided by the agency were clear.

We deny the protest.

The RFP, posted on the Federal Business Opportunities (FedBizOpps) website on August 5, 2003 as a small-business set-aside for the acquisition of up to 1,900 titanium pylon ribs for F-15 aircraft, contemplated the award of a fixed-price requirements contract for a base year, with five 1-year options. The RFP provided for award on the basis of price, first article evaluation, and other non-price factors, in descending order of importance. RFP at 43. All evaluation factors other than price, when combined, were approximately equal in weight to price.

In order to mitigate the risk associated with the purchase of titanium, a material with widely-fluctuating prices, the RFP included a Contractor Acquired Property (CAP) line item, which would allow for reimbursement of the contractor's actual incurred titanium costs under each order. Agency Report (AR), Tab 2, Contracting Officer's Statement (COS), at 1. On August 20, the agency issued amendment No. 0001 to explain how offerors were to price the CAP line item. The amendment provided that the estimated total cost for the CAP line item for the base and all options years was "to be determined by the government." RFP, amend. 1, at 2. On August 22, to further clarify pricing for this line item, the agency posted a memo to offerors at the FedBizOpps website, advising offerors that

[b]ecause of volatility of titanium prices, the Government will assume the risk of the potential for price increases by reimbursing this cost (with allowable and allocable G&A [general and administrative] expenses). **For this reason, your submitted unit prices SHOULD NOT include these costs.** At the time individual orders are issued, that line item will contain funds estimated to be sufficient to cover these costs.

AR, Tab 4B, FedBizOpps Memo to Offerors, at 1.

The agency received [DELETED] proposals by the extended September 12 closing date. The offers ranged in price from [DELETED] to [DELETED]. The agency established a competitive range of [DELETED] offers by eliminating offers priced above [DELETED]. AR, Tab 2, COS, at 1. Because of the wide price disparity even among the competitive range offers, the agency opened discussions by letters to the offerors dated September 15. AR, Tab 2, COS, at 2. Each letter began with an identical paragraph advising offerors of the disparity in the prices received, and that the agency considered this disparity to be "constructive notice of the possibility of a mistake." AR, Tab 6, Air Force Letter Opening Discussions, at 1. Therefore, all offerors were urged

to critically and carefully examine the constitution of your proposal, the elements from which you derived your unit prices . . . and the mathematical calculations contained therein to ensure that your offer is based upon the Government's requirements as stated in the solicitation and Amendments 0001 and 0002 thereto as well as the additional information notices subsequently added to the www.fedbizopps.gov website. In accordance with those postings please ensure that your submitted unit prices DO NOT include the cost of titanium forgings and associated allowable and allocable G&A for that material.

Id. at 3. Following this introductory paragraph, the letter advised each offeror of the deficiencies in its proposal, and advised offerors to submit revised proposals by September 25. By letter dated September 29, the agency notified offerors that PCA

was the apparent successful offeror. AR, Tab 8, Notification of Apparent Successful Offeror, at 1.

Two offerors filed agency-level protests against the award. As relevant here, one of the protesters, Air Industries Machining Corporation (AIM), alleged that it “did not properly understand the instructions intended” in the FedBizOpps memo. AR, Tab 10, AIM’s Agency-Level Protest, at 1. The Air Force denied the protest, stating that AIM had acknowledged receipt of the FedBizOpps memo and the September 15 letter, and that the award was proper. AR, Tab 11, Air Force Denial of AIM’s Agency-Level Protest, at 2. Subsequently, AIM and another offeror protested to our Office. As relevant here, AIM argued that the solicitation did not clearly explain that the government would absorb the full cost of the titanium forgings under the CAP line item, and that the instructions regarding the pricing of this item were inconsistent among offerors. AIM Protest at 1-2. AIM asserted that its price “was based on including the cost of the Titanium Forging with the understanding that the Government would reimburse [it] for the difference as the cost of Titanium fluctuates due to the index price.” *Id.* at 1.

In reviewing the protests, the agency determined that the introductory paragraph in its September 15 letters opening discussions was not identical in all [DELETED] letters; [DELETED] of the [DELETED] letters (including AIM’s and PCA’s) did not include the last sentence, which was intended to clarify the CAP line item (“In accordance with those postings please ensure that your submitted unit prices DO NOT include the cost of titanium forgings”) The Air Force determined that, despite amendment No. 0001 and the FedBizOpps posting, some offerors had been confused regarding the pricing instructions, and that corrective action was appropriate. On October 23, the Air Force notified PCA of its intended corrective action, and on November 3 the agency rescinded the award.

PCA contends that corrective action was unwarranted and “not supported by any credible evidence.” Supplemental Comments at 2. The protester argues that the corrective action would be proper only if AIM “was in fact misled” by the solicitation or by the agency’s letters and amendments aimed at clarifying the pricing. *Id.* In this regard, PCA argues that “no one was disadvantaged by the omission (on some [September 15] letters) of the ‘critical sentence,’” because all letters advised offerors to refer to amendment No. 0001 and to the FedBizOpps memo, receipt of which AIM acknowledged in its protest. Comments at 2.

In negotiated procurements, agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure fair and impartial competition. *Patriot Contract Servs., LLC et al.*, B-278276.11 *et al.*, Sept. 22, 1998, 98-2 CPD ¶ 77 at 4. Where an agency has reasonable concerns that there were errors in a procurement, the agency may take corrective action, even if it is not certain that a protest of the procurement would be sustained. *Main Bldg. Maint., Inc.*, B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3. We will not object to proposed

corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Network Elec. Corp., B-290666.3, Sept. 30, 2002 CPD ¶ 173 at 3.

The corrective action here is unobjectionable. The prices received varied dramatically--as noted above, from approximately [DELETED] to [DELETED] for all offerors and from [DELETED] to [DELETED] for competitive range offerors--and the agency concluded that the offerors' approaches to pricing titanium was the likely cause of the disparity, notwithstanding its efforts to clarify the CAP line item. We have recognized that such dramatic price differentials may reasonably be interpreted to suggest that offerors had dissimilar understandings of the requirements. See Federal Sec. Sys., Inc., B-281745.2, Apr. 29, 1999, 99-1 CPD ¶ 86 at 5. In these circumstances, agencies are not required to ignore the reasonable possibility that the disparate prices received do not accurately reflect the competitive marketplace, and that the award based on those prices may not reflect the most advantageous proposal. Thus, notwithstanding the protester's arguments to the contrary--to the effect that all offerors should have understood titanium pricing under the CAP line item--there was nothing unreasonable in the agency's determination that corrective action was necessary to ensure both that the competition was fair and that the award would be based on the most advantageous proposal.

PCA argues that, because offerors were informed of its low price, rescinding the original award and reopening the competition will foster an auction and put PCA at a competitive disadvantage. However, the Federal Acquisition Regulation does not prohibit auctions, and agencies are not otherwise prohibited from taking corrective action in the form of requesting revised price proposals where the original awardee's price has been disclosed. In this regard, the possibility that the contract may not have been awarded based on a fair determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than does the possibility that the original awardee will be at a disadvantage in the reopened competition. See generally Strand Hunt Corp., B-292415, Sept. 9, 2003, 2003 CPD ¶ 167 at 6.

Finally, the protester requests that all prices be disclosed so that "the other offerors would then be placed in the same predicament as PCA." Supplemental Comments at 2. However, there is no requirement that agencies disclose other offerors' prices under circumstances such as those here, where the awardee's contract price has properly been disclosed. Alatech Healthcare, LLC--Protest; Custom Servs. Int'l, Inc.--Costs, B-289134.3, B-289134.4, Apr. 29, 2002, 2002 CPD ¶ 73 at 4.

The protest is denied.

Anthony H. Gamboa
General Counsel

