



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

Decision

Matter of: Al Long Ford

File: B-297807

Date: April 12, 2006

Tarik S. Daoud for the protester.

William A. Roberts III, Esq., Richard B. O’Keeffe, Jr., Esq., and Antonella Karlin, Esq., Wiley Rein & Fielding LLP, for American Equipment Company, Inc., the intervenor. Vera Meza, Esq., U.S. Army Materiel Command, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where, after discussions had concluded, agency identified concerns pertaining to the achievability of protester’s proposed delivery schedule that should have been apparent to the agency prior to discussions, discussions should have been reopened since proposed delivery schedule was an area that had to be addressed in order for the protester to be in line for award.

DECISION

Al Long Ford (ALF) protests the rejection of its offer and the award of a contract to American Equipment Company, Inc. (AMECO) under request for proposals (RFP) No. W56HZV-05-R-D117, issued by the U.S. Army Tank-automotive and Armaments Command (TACOM) for light utility trucks and accompanying spare parts and manuals. The protester argues that its proposal represented a better value to the government than AMECO’s because it offered a substantially shorter delivery schedule.

We sustain the protest.

The RFP provided for the award of a 2-year, fixed-price, indefinite-delivery/ indefinite-quantity contract for a minimum quantity of 500 and a maximum quantity of 6,000 light utility trucks to be delivered to Iraq. Offerors were requested to furnish separate unit prices for the guaranteed minimum number of trucks, trucks in excess

of the minimum quantity ordered during the first year, and trucks ordered during the second year.¹ The solicitation advised offerors that TACOM considered the requirement to be urgent, and that timely delivery and performance were essential. RFP at 5.

The RFP provided for a two-step evaluation process. During Phase I, offerors' technical proposals were to be evaluated on an acceptable/not acceptable basis, with only those proposals found acceptable advancing to Phase II. During Phase II, proposals were to be evaluated under the factors of delivery, small business participation, and price to determine which proposal represented the best value to the government. The solicitation advised offerors that in the tradeoff determination, delivery was more important than price, which was in turn more important than small business participation.

With respect to delivery, section M of the RFP advised offerors that their offers would be evaluated on the basis of a single date for completion of delivery of the guaranteed minimum quantity to the destination point in Iraq. Section M further advised that the "objective delivery date" for the guaranteed quantity was 120 days after receipt of order (DARO) and that proposals would be evaluated both to assess the extent to which the objective delivery schedule was satisfied and the level of risk in meeting the objective delivery date. The solicitation also furnished the following guidance regarding delivery in section I, under the clause entitled "Delivery Schedule For Delivery Orders":

Proposing an accelerated delivery schedule will not prejudice your offer. However, if you propose a delivery schedule longer than the schedule listed above [which identified the objective delivery date for the minimum quantity as 120 DARO], your offer may be determined unacceptable for award.

RFP amend. 5, at 14.

With respect to the small business participation factor, section M advised offerors that their proposals would be evaluated "based upon the risk and extent of the Offeror credibly achieving the Government's goals for U.S. small business concern participation." RFP at 68. The RFP defined the "goals for evaluation" as small business concern participation (including all subcategories of small business concerns) of 10 percent or more and U.S. small disadvantaged business concern participation of 2.2 percent or more. Id.

Finally, with regard to price, the RFP advised that "[t]he Price Area will be assessed based upon total evaluated price to the Government to include an assessment of

¹ Unit prices for operator manuals and spare parts were also requested.

price reasonableness, realism and affordability to the Government.” § M.2b. The solicitation explained that the realism analysis would be used to measure whether the proposed price “accurately reflects the Offeror’s approach in meeting the solicitation requirements and objectives, as well as an expectation that the solicitation requirements and objectives will be met at a price that will not result in a net loss to the Offeror.” Id.

Twelve proposals were received by the December 6, 2005 due date. The agency found seven of the proposals to be technically acceptable and conducted discussions with each of the seven offerors. By letter dated December 19, the contracting officer notified the offerors that discussions had been concluded and that final proposal revisions (FPR) were due the following day.

All seven offerors whose proposals were found technically acceptable, including ALF and AMECO, submitted FPRs. Since the evaluation of the other five proposals is not relevant to the protest, we address the evaluation of only ALF’s and AMECO’s proposals. Both ALF and AMECO proposed to furnish Ford Model F-350 trucks, which were to be produced at the Ford plant in Louisville, Kentucky. In their FPRs, ALF offered a delivery period of 110 DARO, and AMECO, a delivery period of 150 DARO.² The agency evaluated ALF’s total price as \$207,824,347 and AMECO’s as \$191,443,169. Both proposals were rated as good under the small business participation factor. In performing a tradeoff analysis of the two proposals, the Source Selection Authority (SSA) found that while ALF’s proposed delivery period was more advantageous than AMECO’s proposed delivery period, ALF’s proposed schedule had a very high risk associated with it. Agency Report (AR), Tab 18, Memorandum of Source Selection Decision, at 5. In this regard, the SSA noted that on the delivery questionnaire that ALF submitted with its proposal, the protester identified its production lead time for the trucks as 53 days.³ When members of the

² The other five offerors proposed delivery periods of 110, 120, 150, 160, and 180 DARO.

³ Offerors were required to complete a “delivery questionnaire” furnishing substantiating detail regarding their proposed delivery schedules. In addition to asking offerors the number of days after receipt of order that it would take to have the minimum required quantity available for shipment (which is the number that the agency refers to as “production lead time”), the questionnaire instructed each offeror to identify its shipping company and port of embarkation and to explain how the vehicles would be transported from the original location to the point of embarkation and the number of days to do so; how the vehicles would be transported from the point of embarkation to the port of debarkation and the number of days to do so; and how the vehicles would be transported from the point of debarkation to the final delivery point and the number of days to do so. The delivery questionnaire also asked offerors to furnish the name of a point of contact capable of communicating in English.

source selection evaluation board contacted the Ford Fleet Regional Marketing Manager on December 22 to verify Ford's anticipated production schedule for the vehicles, however, he informed them that "any award made between now and the end of the calendar year would realize a 90 day production lead time for F-350 trucks manufactured at [Ford's] Louisville, KY facility." *Id.* at 6.⁴ Using a production lead time of 90 days, the SSA recalculated ALF's total delivery time as 147 DARO.⁵ The SSA then compared ALF's proposal to AMECO's and concluded that there was no

⁴ A summary of the conversation prepared by one of the evaluators furnished the following additional detail regarding the information conveyed by the Ford manager:

We [the evaluators] learned quite a bit of information about when in the cycle an order would have to be placed to achieve maximum delivery flexibility. In essence, if orders were placed before the middle of the month, they could be slotted into production the next month. If orders went beyond the middle of the month, basically they would have to wait an additional 30 days before getting into the production schedule. In this regard, any order placed now would not begin production until February 06.

[The Ford manager] indicated there is a block of 250 vehicles slated for February production on an "if come" basis for TACOM. The February schedule can not be moved up. When asked if there were another 250 vehicles required, when could they be manufactured--[the manager's] reply was "March", no sooner. We confirmed with [the manager] that if we were to make an award within the next week, the 250 each would be produced in Feb and any quantity up to 1,000 could be produced in March 06.

When we posed the question that this would indicate a 90 day production lead time, [the manager's] answer was "Yes".

AR, Tab 14.

⁵ The SSA recalculated ALF's delivery period by adding the number of days that ALF had identified in its delivery questionnaire for transportation from the point of embarkation to the port of debarkation (45) to the 90 days that he had determined to be the correct production lead time. He then added another 12 days to the sum to "reflect the time required by Al Long Ford to ship from the Ford plant to the refit facility, refit the vehicles, inspect and accept the vehicles, load them onto the ship . . . and offload the vehicles at the port of debarkation." AR, Tab 18, Memorandum of Source Selection Decision, at 6. The SSA assumed that 12 days was the time period that it would take ALF to complete these tasks because this was the difference between its overall offered delivery period of 110 days and the sum of 53 (the number of days to get the minimum required quantity ready for shipment) and 45 (the number of days for shipping).

meaningful distinction between the two offers with regard to the small business participation factor and that “the advantage of 3 days in delivery of the Al Long Ford proposal [did] not justify paying [an] 8.6% price premium.” Id. The SSA concluded that AMECO’s proposal, which had the lowest evaluated price, represented the best value to the government. On December 29, TACOM awarded a contract to AMECO and issued it a delivery order for the minimum guaranteed quantity of trucks.

ALF protests the award to AMECO, arguing that the SSA should not have recalculated its delivery period for purposes of the tradeoff determination as 147 days because it offered to deliver—and would in fact have delivered—the trucks within 110 DARO, as it proposed to do. The protester further complains that the recalculation was performed without its being given the opportunity to validate its proposed delivery schedule. ALF contends that given that delivery was to have carried greater weight than price in the determination of best value, its proposal should have been determined a better value than AMECO’s and selected for award.

As a preliminary matter, the agency argues that ALF is not an interested party to protest the award to AMECO because it would not be next in line for award if the award to AMECO were set aside. The agency contends in this regard that there is another offeror (offeror C) with a lower evaluated price than ALF’s.

In order for a protest to be considered by our Office, a protester must be an interested party, which means that it must have a direct economic interest in the resolution of a protest issue. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2005); Cattlemen’s Meat Co., B-296616, Aug 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A protester is an interested party to challenge the evaluation of its own proposal where there is a reasonable possibility that the proposal would be in line for award if the protest were sustained. Transportation Research Corp., B-231914, Sept. 27, 1988, 88-2 CPD ¶ 290 at 3.

It is not apparent from the record here which offeror—offeror C, ALF, or another offeror—would be in line for award if the award to AMECO were set aside. The source selection document did not establish an overall ranking for the proposals. Moreover, while it is true that offeror C’s evaluated price was slightly lower (less than 1 percent) than ALF’s, offeror C proposed a delivery period 10 days longer than ALF’s; thus, it is not clear that the agency would have determined offeror C’s proposal to represent a better value to the government than ALF’s. Because we think that there is a reasonable possibility that ALF’s proposal would be in line for award if its protest objecting to the recalculation of its delivery schedule were sustained, we conclude that ALF is an interested party to maintain the protest.

With regard to the protester’s argument that the SSA should not have relied on his recalculation of ALF’s delivery schedule without giving ALF the opportunity to validate its proposed schedule, the agency responds that “it was perfectly reasonable for TACOM to independently verify the proposed delivery schedule information with Ford Motor Company, the identified vehicle manufacturer,” Agency Legal

Memorandum at 2, since ALF provided no information from the manufacturer to support its proposed schedule despite a solicitation instruction to provide substantiating information confirming the achievability of the offeror's proposed delivery schedule. The agency further argues that in its FPR, AFL reduced its production lead time by 7 days and its overall delivery time by 10 days without explanation or support,⁶ and that it was under no obligation to reopen discussions to allow the protester to address concerns regarding the achievability of this shortened schedule.

First, regarding TACOM's assertion that the protester failed to substantiate its proposed schedule in its offer despite a solicitation clause instructing it to do so, the clause in question, § L.2.2.2, provided as follows:

In addition to the Offeror's proposed delivery schedule, completion of the Delivery Questionnaire in Attachment 004 will require the offeror to provide substantiating information which confirms the achievability of the Offeror's proposed schedule, either as a Manufacturer or as a Dealer/Distributor. Offerors are advised that Attachment 004 questionnaires require the offeror to identify Points of Contact in order for the Government to verify certain proposal information. These Points of Contact must speak English and be readily available either by telephone or by email. In the event the Government cannot contact these Points of Contact, validation of the Offeror's proposal may be considered to lack credibility and will be assessed accordingly.

The only reasonable reading of the above clause is that the substantiating information confirming the achievability of their proposed schedules required of offerors was the information required by the delivery questionnaire, and the delivery questionnaire, while asking offerors to identify the number of days after receipt of order that it would take them to have the specified quantity available for shipment, did not ask them to substantiate that number.⁷ Thus, we do not think that ALF can

⁶ In its initial proposal, ALF offered a production lead time of 60 days and an overall delivery period of 120 days.

⁷ The questionnaire posed the following questions under the heading "Delivery Availability":

Manufacturers (Original Equipment Manufacturers):

What is the normal or routine production lead time, in days after contract award, for the above line item? _____. Do not include transportation time to destination.

Do you have any quantity of the above line item currently in inventory

(continued...)

be said to have acted contrary to the instructions of the solicitation by failing to provide substantiation of this aspect of its proposed delivery schedule in its proposal.

Further, while we agree with the agency that where an offeror introduces an element in a post-discussions revision to its proposal that the agency views as a weakness or a deficiency, the agency is not required to reopen discussions to address the new concern, Cube-All Star Servs. Joint Venture, B-291903, Apr. 30, 2003, 2003 CPD ¶ 145 at 10-11, it is clear from the record that it was not ALF's shortening of its overall delivery and production lead times in its FPR that gave rise to the agency's concern regarding the achievability of its proposed schedule; rather, it was ALF's proposal of a production lead time of less than 90 days and an overall delivery period of substantially less than 150 days, both elements that were also present in ALF's initial proposal. In this regard, the record shows that the agency recalculated the production lead time and overall delivery period for all offerors proposing a production lead time of less than 90 days and an overall delivery period of less than 150 days. In other words, the aspects of ALF's proposal that caused the agency concern were also present in its initial proposal. The question thus arises as to whether the achievability of ALF's proposed production lead time and overall delivery schedule should have been a topic for discussions, and whether the fact that the agency did not become aware of the information that gave rise to its concerns about the achievability of the protester's proposed schedule until after discussions had closed relieved the agency of any obligation to raise the matter in discussions.

Where contracting agencies conduct discussions with offerors whose proposals are within the competitive range, the discussions must be meaningful. Professional Servs. Group, Inc., B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 at 3. Discussions cannot be meaningful if an offeror is not advised of the weaknesses, deficiencies, or excesses in its proposal that must be addressed in order for the offeror to be in line for award. Mechanical Contractors, S.A., B-277916.2, Mar. 4, 1998, 98-1 CPD ¶ 68

(...continued)

or otherwise available for immediate delivery? _____ If so, how many are available and where are they located?

Suppliers (Dealers/Distributors for OEMs):

Do you have any quantity of the above line item currently in inventory or otherwise available for immediate delivery: ___No ___ If so, how many are available and where are they located? _____

If you do not have the quantity of the above line item currently in inventory or otherwise available for immediate delivery, how many days after receipt of order would it take to have the above quantity available for shipment? _____. If incremental deliveries are planned, state the quantity and DARO for each incremental shipment _____

at 4. Here, we think that the agency's failure to raise its concerns regarding the achievability of ALF's proposed delivery schedule constituted a failure to conduct meaningful discussions because the protester might well have been determined to be in line for award if it had been able to validate its proposed schedule.⁸ Further, we do not think that the agency was relieved of its obligation to conduct discussions due to the circumstance that it did not learn of the information giving rise to its concerns until after discussions had concluded. If, after discussions are completed, the agency identifies concerns pertaining to the proposal as it was prior to discussions that would have had to be raised if they had been identified before discussions were held, the agency is required to reopen discussions in order to raise the concerns with the offerors. See DevTech Sys., Inc., B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11 at 4. The key fact is that the concerns (while identified after discussions have been closed) relate to the proposal as it was prior to discussions.⁹ Id.

Before we will sustain a protest, the protester must demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 2006, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 103 F.3d 1577, 1581 (Fed. Cir. 1996). With regard to the issue of prejudice to the protester here as a result of the agency's failure to discuss its proposed delivery schedule with it, on the basis of the record before us it is reasonable to conclude that ALF could have demonstrated that its proposed schedule—or perhaps, an amended one of more than 110, but substantially less than 147, days—was achievable. In this regard, the protester, who is a Ford dealer, maintains that it “had discussions with Ford Motor Company in early December 2005, wherein Ford told us that they expected they would be able to get greater allocations of vehicles than they had been getting and could produce the vehicles

⁸ We recognize that the agency did ask ALF to furnish additional detail regarding its shipping schedule during discussions, but there was nothing in the agency's request that would have placed the protester on notice that the agency had concerns regarding the achievability of ALF's proposed production lead time or overall delivery schedule.

⁹ To the extent that the agency takes the position that the urgency of the requirement precluded it from reopening discussions here, we point out that according to the agency, the Ford spokesperson informed the evaluators that orders placed before the middle of the month could be slotted into production that month, whereas orders received after the middle of the month could not be slotted into production until the following month, meaning that production on any order placed prior to the middle of January would begin at the same time (i.e., the beginning of February) as an order placed in late December. In other words, the agency could have delayed award of the contract here by up to two weeks without any impact on the commencement of production.

required in 45 days.” Protester’s Comments, Feb. 10, 2006, at 2. We think that the protester’s assertion that Ford officials represented to it that they expected to be able to produce the vehicles requested in 45 days is supported by the fact that two offerors other than the protester proposed production lead times substantially similar to the protester’s (that is, production lead times of significantly less than 90 days). We also think that the representation by the Ford manager during his December 22 conversation with the agency evaluators that while only 250 trucks could be manufactured in February, “any quantity up to 1,000 could be produced in March,” strongly suggests that it will take substantially less than the full month of March to manufacture the remaining 250 of the guaranteed minimum quantity, which would result in a significant reduction of the projected production lead time. Accordingly, we conclude that the record supports a finding that ALF was prejudiced by the agency’s failure to discuss the achievability of its production lead time and overall delivery schedule with it, and we sustain ALF’s protest.

ALF also argues that it was unreasonable for the agency to have assigned its proposal the same rating as AMECO’s under the small business participation factor, given that it is a small business and AMECO is not.

In response, the agency explains that it rated both ALF’s and AMECO’s proposals as excellent for small business participation and as poor for small disadvantaged business participation, leading to overall ratings of good under the small business participation factor for both offerors, based on both having proposed small business concern participation in excess of the solicitation’s defined goal of 10 percent and small disadvantaged business participation of less than the solicitation’s defined goal of 2.2 percent. The agency’s position is in essence that it was reasonable for it to rate a proposal as excellent with regard to small business participation so long as the offeror’s proposed level of small business participation exceeded the solicitation’s defined goal. We agree. The RFP provided that proposals would be evaluated to determine the extent to which they proposed levels of small business participation meeting the government’s goals; thus, we think that it was consistent with the solicitation’s terms and reasonable for the agency to assign its highest rating to proposals fully meeting or exceeding the government’s goals. The fact that the protester is a small business did not require that it receive a higher rating than a non-small business.

ALF further argues that AMECO’s prices for the second ordering period are unrealistically low and will result in a loss on each truck ordered.

While an agency is not required to conduct a realism analysis where a solicitation contemplates award on a fixed-price basis, an agency may, as the agency did here, provide for the use of a price realism analysis for the limited purpose of measuring an offeror’s understanding of the requirements or to assess the risk inherent in an offeror’s approach. Cross Match Tech., Inc., B-293024.3, B-293024.4, June 25, 2004, 2004 CPD ¶ 193 at 14 n.6.

Here, the record shows that the agency did perform an analysis of the realism of AMECO's pricing through comparison with other offerors' pricing, and that it concluded that AMECO's prices, while lower than other offerors', were realistic. While the protester disputes this conclusion, it has not offered any evidence in support of its position; instead, it merely asserts that it has been able to determine, based on information furnished to it by Ford and its own knowledge of the costs involved, that "it is absolutely and obviously impossible for AMECO to sell these trucks at the price offered without resulting in a 'net loss to the offeror.'" Protester's Comments at 3. The protester's assertion that it can tell, based on information that it has not shared with our Office, that AMECO's prices are so low that they will result in a loss, is simply not enough to support its position here.

Finally, ALF complains that while clauses 34 and 36 of section I of the RFP require offerors to identify their contractor's and subcontractor's plants, AMECO incorrectly identified Ford Motor Company, Detroit, Michigan as its contractor's plant and failed to identify its subcontractor's plant. The protester asserts that AMECO's failure to identify its subcontractor's plant may imply that AMECO does not realize that the trucks must be modified to meet the solicitation's requirements after their manufacture by Ford and that AMECO may therefore not have accounted for the expense or time required to make these modifications in its proposal.

The clauses in question require the offeror to specify the location where the supplies to be furnished will be available for government inspection.¹⁰ Even assuming that

¹⁰ Clause 34 (Inspection Point: Origin Acceptance Point: Destination) provides as follows:

The Government's inspection of the supplies offered under this order shall take place at ORIGIN. The Government's acceptance of the supplies offered under this order shall take place at DESTINATION. Offeror must specify below the exact name and address of his facility, or his subcontractor's facility, where supplies to be furnished under this order will be available for origin inspection.

Contractor's Plant: _____

Subcontractor's Plant: _____

Similarly, clause 36 (Inspection Point: Origin) provides as follows:

We will inspect the supplies as described elsewhere in this solicitation/contract before acceptance. Fill-in the location, contractor's or subcontractor's plant, where origin inspection will occur.

Contractor's Plant: _____

(continued...)

AMECO's entry of Ford Motor Company, Detroit, Michigan as its point of inspection was in error because the trucks in question are to be manufactured at Ford's Kentucky plant, identification of the point of inspection has no bearing on the acceptability of an offer. See Heieck Supply, B-171588, June 7, 1971. Moreover, we see no basis for the protester's argument that AMECO's failure to identify a subcontractor's plant as its inspection point implies that it does not intend to have a subcontractor modify the vehicles after their manufacture by Ford.¹¹

Because we find that the agency should not have determined ALF's delivery schedule high risk and recalculated it to the protester's prejudice without raising the matter with the protester in discussions, we sustain ALF's protest. However, because the agency has proceeded with performance of the delivery order for the minimum guaranteed quantity and the trucks are urgently required, we do not recommend that discussions be reopened to give the protester the opportunity to validate its schedule. Instead, we recommend that the protester be reimbursed its proposal preparation costs.¹² Bid Protest Regulations, 4 C.F.R. § 21.8(d)(2). We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). In accordance with section 21.8(f), ALF's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel

(...continued)

Subcontractor's Plant: _____

¹¹ ALF also objects to the agency's override of the stop work order issued in response to its protest; our Office, however, does not consider such challenges. Shel-Ken Properties, Inc.; McSwain and Assocs., Inc., B-261443, B-261443.2, Sept. 18, 1995, 95-2 CPD ¶ 139 at 3.

¹² While the protester also requests that it be reimbursed for its lost profits, we will not make such a recommendation because even where an offeror has been wrongfully denied award of a contract, there is no legal basis for allowing recovery of lost profits. Firebird Constr. Corp.-Recon., B-246182.2, May 27, 1992, 92-1 CPD ¶ 473 at 2.