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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Rhonda Podojil--Agency Tender Official

File: B-311310

Date: May 9, 2008

LTC Daniel G. Jordan, and Randall J. Vance, Esq., Department of the Army, for the protester.
Thomas J. Madden, Esq., Terry L. Elling, Esq., and Sharon A. Jenks, Esq., Venable LLP, for Sodexho Management, Inc., the intervenor.
Scott N. Flesch, Esq., Department of the Army, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by agency tender official (ATO) challenging result of competition conducted pursuant to OMB Circular A-76 is dismissed as untimely where the ATO filed the protest more than 10 days after the ATO knew or should have known the basis of protest. While debriefing exception to timeliness rules applies to A-76 competitions conducted on the basis of competitive proposals, protest nevertheless is untimely because the ATO did not timely request a debriefing--a predicate to invoking the exception.

DECISION

Rhonda Podojil, the agency tender official (ATO) for the U.S. Army Medical Command tender in a public-private competition under Office of Management and Budget (OMB) Circular A-76, protests the Army's decision to procure nutrition care services at 10 military treatment facilities in the United States through a contract awarded to Sodexho Management, Inc. under request for proposals (RFP) No. W81K04-07-R-0016, rather than continuing to have those services performed in-house by government employees.[1] On behalf of the employees, the ATO argues that

[1] The 10 military treatment facilities are located at Forts Eustis, Gordon, Irwin, Jackson, Knox, Leonard Wood, Riley, Sill, and Stewart, and the U.S. Military Academy at West Point.

through discussions, the contracting officer led the protester to increase its staffing to a level beyond that required by the RFP, which in turn caused the protester to increase its price to its competitive prejudice.

We dismiss the protest as untimely.

On September 15, 2006, the U.S. Army Medical Command, Center for Health Care Contracting, published an announcement on the Federal Business Opportunities (FedBizOpps) website, publicizing the Army's intent to conduct a standard competition[2] to compare the cost of continued in-house performance of the requirements at issue with obtaining those services by contract. On June 22, 2007, the agency issued the RFP, which provided for a "lowest-priced, technically acceptable" selection process. By the RFP closing time, the agency received four private-sector proposals, including a proposal from Sodexho, as well as the agency tender, which was submitted by the ATO.[3]

The Army performed an initial evaluation of the agency tender and found its proposed approach to be technically unacceptable. Through written discussions with the ATO dated October 9, the agency raised its concerns regarding the agency tender's proposed approach. After receiving a revised technical proposal, the Army reassessed the agency tender's technical proposal, again found it to be technically unacceptable, and again raised its concerns with the protester in "face-to-face" discussions in early December. In response, the protester then submitted a second revised technical proposal for the agency tender, which the Army evaluated as technically acceptable. In a letter dated January 14, 2008, the agency notified the protester that the technical proposal of the agency tender had been evaluated as acceptable, but asked the protester to address certain errors in the agency tender's pricing proposal, update the pricing to reflect newly issued 2008 General Schedule pay information, and submit a final revised proposal. Thereafter, the protester

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[2] The Circular establishes the standard competition procedures at Attachment B, Section D. Under this process, the agency issues a solicitation, obtains offers from private-sector firms and an agency tender (which includes a staffing plan--referred to by the Circular as a most efficient organization (MEO)), performs a source selection, and then, based on the results of the competition, either makes an award to a private-sector offeror or enters into a letter of obligation with an agency official responsible for performance of the MEO.

[3] Under the A-76 process, the agency tender does not directly compete against Sodexho's proposal until the final cost comparison stage of the study process. Nevertheless, the agency tender was required to include a technical proposal identifying its approach to accomplishing the agency's requirements as established by the RFP, and the Army evaluated the agency tender concurrently with the private sector proposals.

submitted a final proposal revision for the agency tender in the amount of $70,403,570. Consistent with advice from the agency in the January 14 letter, the protester did not revise the technical proposal of the agency tender since it had been evaluated as acceptable by the agency.

On February 12, utilizing the OMB A-76 COMPARE software, the Army compared the cost of in-house performance (based on the technically acceptable agency tender) with the cost of private-sector performance (based on the price proposed by Sodexho, which had submitted the lowest-priced technically acceptable private-sector proposal). The software adjusts the cost of in-house performance and the private-sector price to include, for example, the addition of a "conversion differential" to the private-sector price, calculated as the lesser of 10 percent of the MEO's personnel-related costs or $10 million. OMB Cir. A-76, Attach. B ¶ D.5.a(4)(c). Sodexho's price as adjusted by the COMPARE software was determined to be $4,739,463 less than the protester's cost of $70,403,570. The ATO was present when the Army conducted this comparison and was provided a copy of the cost comparison form indicating that the agency tender had lost the competition based on price. The ATO indicates that she then "informally" spoke with the contracting officer and his counsel. As a consequence of this conversation, she states that she understood that, as the ATO, she was entitled to a debriefing within 10 days of the selection decision. Later that morning, via a video teleconference, the Army announced the results of the cost comparison to the affected in-house federal employees. Also that day, the agency published the results of the A-76 competition on FedBizOpps. On February 19, 7 days later, the ATO wrote to the contracting officer to schedule a debriefing. The Army provided the ATO with a debriefing on February 21 and the ATO filed this protest on March 3.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 at 2. Under these rules, a protest such as the ATO's, based on other than alleged improprieties in a solicitation, must be filed not later than 10 days after the protester knew or should have known of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2007). An exception to this general rule is a protest that challenges "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required." Id. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the protest must be filed not later than 10 days after the date on which the debriefing is held. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 5.

In addressing the timeliness of the ATO's protest, we first turn to the question of when the ATO knew or should have known the basis for protest. In this regard, the ATO argues that in evaluating the technical proposal of the agency tender, the Army deviated from the RFP's evaluation factors and subfactors, which established the

requirements of acceptability. Specifically, the protester alleges that during discussions, the Army made clear that, in order to be found technically acceptable, the agency tender was required to increase its staffing to meet performance standards exceeding those set forth in the RFP. The ATO generally alleges that the increase in costs associated with meeting these higher standards resulted in the agency tender having a higher adjusted price than that of Sodexho's proposal. Protest at 1, 3.

Since the allegedly higher standards were conveyed by the Army through discussions, the ATO knew or should have known that the Army's imposition of allegedly higher standards had a prejudicial effect when she learned the results of the cost comparison on February 12, indicating that Sodexho had prevailed based on price. The protest, however, was not filed until March 3, more than 10 days after February 12. Therefore, in order for the ATO's protest to be timely, it must fall within the debriefing exception noted above.

As stated previously, this exception applies only where the debriefing provided is in connection with "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required." 4 C.F.R. § 21.2(a)(2). In addressing this question, we note that the term "competitive proposals" is not defined by our Bid Protest Regulations, nor by statute or regulation. See Systems Plus, Inc. v. United States, 68 Fed. Cl. 206 (2005); The MIL Corp., supra, at 6. However, we have previously determined that the use of negotiated procedures in accordance with Federal Acquisition Regulation (FAR) Part 15 and as evidenced by the issuance of an RFP, constitutes a procurement conducted on the basis of competitive proposals for purposes of this exception to our timeliness rules. The MIL Corp., supra; Professional Rehab. Consultants, Inc., supra.

Here, consistent with the A-76 competition process, the Army expressly incorporated and used FAR Part 15 procedures as the framework for the A-76 competition.[4] In this regard, pursuant to the competition process established by the Circular, the Army issued a solicitation seeking "proposals" (the RFP), which provided for a lowest-priced, technically acceptable source selection in accordance with FAR § 15.101-2. The Army held discussions with the protester and private-sector offerors in accordance with FAR § 15.306, which resulted in revisions to the agency tender and private-sector proposals consistent with FAR § 15.307, and after announcing the results of the cost comparison, consistent with FAR Part 15, the Army provided the protester and Sodexho, at their request, with debriefings. As a consequence, we

[4] Throughout, the Circular directs agencies to follow the procedures established under FAR Part 15. See, e.g., OMB Cir. A-76, Attach. B, ¶¶ A.8.e, D.2.c, D.3.a(2), D.4.a(3), D.5.b(1), D.5.b(2), D.5.b(3), D.5.c(2), D.5.c(4), D.6.c, D.6.d, and Attach. D, at D-7.

conclude that the A-76 competition here was conducted on the basis of "competitive proposals."

The next question is whether the debriefing was a "required" debriefing for the purpose of applying our timeliness rules. In this regard, when a contract is awarded on the basis of "competitive proposals," 10 U.S.C. § 2305(b)(5)(A), implemented through FAR § 15.506(a)(1), provides that "an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award." The agency and intervenor argue that the debriefing which the contracting officer provided the ATO here was not a "required" debriefing for several reasons. Both point to the fact that the Circular does not reference the type of required debriefing contemplated by FAR § 15.506, but merely requires agencies to offer a debriefing "in accordance with FAR § 15.503," which pertains solely to award notice requirements for unsuccessful offerors. OMB Cir. A-76, Attach. B ¶ D.6.d; FAR § 15.503 Notifications to Unsuccessful Offerors. The intervenor further argues that the ATO's debriefing was not required because such debriefings are limited to "offerors," and the ATO is not an "offeror." In support of this contention, the intervenor notes that the ATO cannot be an offeror, since if the agency tender were to prevail in the competition, it would not result in the award of a contract, citing our decision in Dan Duefrene et al., B-293590.2 et al., Apr. 19, 2004, 2004 CPD ¶ 82 at 5. The intervenor and the agency further argue that, even if the possibility of a required debriefing existed, the debriefing provided to the ATO would not qualify, since it was not timely requested.

In addressing the specific question of whether the debriefing at issue was a required debriefing for the purpose of establishing timeliness, we first address the general assertion by the agency and the intervenor that debriefings are not required in the context of an A-76 competition. We reject this contention for the simple reason that the statutory debriefing requirements established by 10 U.S.C. § 2305(b) and FAR Part 15 hinge on whether an agency is making an award on the basis of "competitive proposals." Where an agency makes its selection decision under an A-76 competition on the basis of "competitive proposals," as in this case, we think that the statutory and regulatory debriefing scheme is invoked, notwithstanding the more limited debriefing guidance set forth in the Circular.[5]

[5] We question whether the Circular's reference to the award notice requirements of FAR § 15.503 in connection with debriefings under the Circular may in fact have been a drafting error. Preceding its discussion of debriefings, the Circular expressly requires agencies to announce the results of a competition conducted using competitive proposals through FedBizOpps, providing the limited information required under FAR § 15.503(b). It would seem redundant to then have agencies

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Turning to the question of whether the public-sector competitor in an A-76 competition can rely on the debriefing exception to our timeliness rules for the purpose of establishing the timeliness of its protest at our Office despite the fact that it is not technically an "offeror," we note that the standing of the public-sector competitor to protest public-private competitions conducted pursuant to A-76 has a lengthy history. In addressing the various issues in this regard, GAO has consistently recognized the importance of establishing, in the conduct of A-76 competitions, a level playing field between public and private-sector competitors, a principle unanimously agreed to by the Congressionally-chartered Commercial Activities Panel. Commercial Activities Panel, Final Report: Improving the Sourcing Decisions of the Government (Apr. 2002) at 10 (stating "[t]he Panel believes that in order to promote a more level playing field on which to conduct public-private competitions, the government needs to shift . . . to a FAR-type process under which all parties compete under the same set of rules").

Consistent with this principal, it is our intent to apply our timeliness rules to public- and private-sector protesters of A-76 competitions in an even-handed manner. As a consequence, where an agency conducts an A-76 competition on the basis of competitive proposals, as in this case, thereby triggering the debriefing requirements established by statute and the FAR, we will interpret those provisions as applying equally to public-sector competitors for the purpose of invoking the debriefing exception to our timeliness rules.

For the same reason, however, when protesting the results of an A-76 competition, in order to fall within the debriefing exception to our timeliness rules, a public-sector competitor, like its private-sector counterpart, will be held to compliance with the rules necessary to establish its debriefing as a "required" debriefing. As noted above, a debriefing is only required where it is timely requested--within 3 days of receiving notice of the award decision. In this case, the ATO's written request for the debriefing was made 7 days after receiving notice of the award decision. We therefore conclude that, by its terms, the debriefing exception does not apply. Absent application of the debriefing exception, the ATO was required to file its protest within 10 days of when it knew or should have known its basis of protest; because the protest was filed more than 10 days later, it is untimely.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

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offer debriefings to A-76 competitors which provide them only with the same information the agency had previously posted on FedBizOpps.