



Comptroller General
of the United States
Washington, D.C. 20548

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Glass

Decision

Matter of: Rexon Technology Corporation; Bulova Technologies, Inc.

File: B-243446.2; B-243446.3

Date: September 20, 1991

Peter F. Garvin, III, Esq., and Rosemary Maxwell, Esq., Jones, Day, Reavis & Pogue, for Rexon Technology Corporation, and James A. Dobkin, Esq., and Karen I. Meyer, Esq., Arnold & Porter, for Bulova Technologies, Inc., the protesters. Craig E. Hodge, Esq., and Sharon A. Lipes, Esq., Department of the Army, for the agency. Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Performance Incentive Contracting (PIC) provision contained in solicitation that provides for a preference to be given to offerors for quality and on-time delivery was ambiguous and did not provide the government an adequate basis for making a best value analysis. Since the agency in its resolicitation merely deleted the PIC provision, showing that award based on merely price and price-related factors would satisfy their needs, award to the low offeror under the original solicitation was proper since no offeror was prejudiced by the ambiguous provision and the awardee's product meets the agency's needs.

DECISION

Rexon Technology Corporation protests the action of the U.S. Army Armament, Munitions and Chemical Command (AMCCOM) in terminating for the convenience of the government a contract awarded to Rexon under request for proposals (RFP) No. DAAA09-90-R-0874. Bulova Technologies, Inc. and Rexon protest AMCCOM's subsequent cancellation of the solicitation. The solicitation was issued by AMCCOM for fuzes and safety and arming modules used in projectiles fired by the 105 and 155mm howitzers.

We sustain Rexon's protest and we deny Bulova's protest.

The initial RFP was issued on October 9, 1990, and was restricted to industrial mobilization base producers. The RFP provided for the procurement of 280,607 fuzes and 79,261 safety and arming modules. Subsequent amendments increased the quantities to 671,164 fuzes and 134,875 safety and arming modules and established an evaluated option quantity of 244,695 fuzes. The initial RFP provided for award based primarily on price. Amendment No. 0004, issued December 10, 1990, added three provisions to the solicitation implementing AMCCOM's new Performance Incentive Contracting (PIC) program. The PIC program provides for a preference to be given offerors for quality and on-time delivery and establishes a number of criteria that an offeror must meet to qualify for the preference. Once qualified, an offeror is given a 10-percent preference over nonqualified offerors.

Amendment No. 0004 required offerors who wished to be considered under the PIC program to apply by listing their AMCCOM Rock Island site fixed-price contracts awarded in the past 3 years in the Federal Stock Class (FSC) being procured. The amendment also stated that the purpose of the PIC program is:

"to obtain the best purchase value for the Government based upon demonstrated performance history. The Government recognizes that even among responsible contractors there are varying degrees of risk associated with a contractor's performance of a contract. The Government, under this program, is willing to pay higher prices to lower risk contractors to increase overall on-time delivery of quality products. The PIC Program works under the assumption that award to a contractor with a good production and quality record for the [FSC] in question will improve the chances of the Government receiving a quality product on time. . . . Qualification criteria for the PIC program . . . is as follows:

- (1) The offeror must have been awarded at least one fixed price HQ, AMCCOM, Rock Island site contract in the [FSC] being procured during the last [3] years, and
- (2) Must have had at least [2] months production deliveries scheduled for the contract line items within the FSC during the last [3] years, and
- (3) Must have at least [90] percent on-time delivery rate for the items that were scheduled for delivery on all open

contracts within the FSC from award of the contract(s) to 30 days prior to this solicitation closing date and/or must have at least a [90] percent on-time delivery rate for the items that were scheduled for delivery on the most recently completed contract, and

- (4) Must not be included on the HQ, AMCCOM, Contractors Requiring Special Attention (CRSA) list, when it has been determined that inclusion on the list was at least partially due to performance problems within the specific stock class, and
- (5) Must not have been terminated for default on any HQ, AMCCOM contract within the specific [FSC] being procured during the past [2] years, and
- (6) Must have a current overall quality rating equal to or greater than 90 for contracts which include the [FSC] being procured, or have been certified under the Contractor Performance Certification Program (CP(2)), as determined by the Product Assurance and Test Directorate."

Four offers were received by the closing date of December 21, 1990. Rixon was low with a price of \$11,459,233.93 and Bulova was second low with a price of \$12,378,406.16. Both Rixon and Bulova applied for the PIC preference and a PIC evaluation was performed. Bulova was found qualified for the PIC program while Rixon initially was found not qualified. It was determined that Rixon, as required by the program, did not have a quality rating of at least 90 under the Contractor Performance Certification Program. Rixon was found to have a score of 84.8 on the relevant contracts.

In accordance with the RFP PIC provision, Rixon challenged the Army's adverse determination. The Army reconsidered its conclusion that Rixon's past quality did not meet PIC standards and revised the ratings on three contracts, which resulted in raising Rixon's overall rating to a qualifying 90.8. Since Rixon and Bulova were both PIC qualified, on March 20, 1991, Rixon was awarded the contract.

On March 28, 1991, Bulova protested the award to our Office and challenged the PIC status of Rixon. In response to that protest, the Army again reviewed Rixon's PIC evaluation and discovered that there were many inconsistencies between the intent of the PIC provision, the evaluation performed, and

the actual language of the provision. The Army concluded that depending on how the PIC provision was interpreted, Raxon may or may not be PIC qualified. Since the PIC provision provides for the addition of a 10-percent evaluation factor to the low evaluated offer if the offer is not PIC qualified, Bulova would be the low evaluated offeror if only Bulova were PIC qualified and Raxon were not.

Consequently, on April 22, the Army terminated for convenience the contract with Raxon because of the ambiguities and inconsistencies contained in the solicitation evaluation provisions. On April 29, our Office dismissed Bulova's protest as academic and premature. On April 26, Raxon filed an agency-level protest against the termination for convenience, which was denied by the Army by letter of May 10. Raxon subsequently filed a protest with our Office on May 14.

On June 14, the Army decided to cancel the solicitation and resolicit for the requirement. The new solicitation, issued on July 9, increased the basic funded quantities,^{1/} again restricted the solicitation to the mobilization base, and changed the evaluation plan by removing the PIC provision. The solicitation also stated that the agency could make up to two awards. On June 28, Bulova protested the cancellation and resolicitation.

Raxon asserts that it was the low bidder with or without the PIC preference and consequently any ambiguities in the PIC provision do not justify the termination of its contract. Bulova, on the other hand, argues that the cancellation of the RFP and resolicitation is improper because the PIC provision was not ambiguous and Bulova was entitled to receive award of the contract under the canceled RFP. Bulova argues that Raxon could not qualify under any interpretation of the PIC criteria and since Bulova did qualify, Bulova should be awarded the contract under the original RFP.

Our Office generally does not review an agency's decision to terminate a contract for the convenience of the government, since that is a matter of contract administration which is not within our bid protest function. However, we will review such a termination, where, as here, it is based upon an agency determination that the initial contract award was improper.

^{1/} The Army increased the basic quantity for fuzes to 861,383 and eliminated the option quantities. Under the initial RFP, offerors were evaluated for a combined based bid of 671,164 fuzes and an evaluated option of 244,695 for a total of 915,859 fuzes. The requirement for the safety and arming modules remained the same. Consequently, we do not believe the funded quantity increase to be significant.

Norfolk Shipbuilding and Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 CPD ¶ 667. It is fundamental that offerors must be advised of the basis upon which their proposals will be evaluated. A solicitation that does not set forth a common basis for evaluating offers, which ensures that all firms are on notice of the factors for award and can compete on an equal basis, is materially defective. The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425. Here, we believe the solicitation was defective because the PIC provisions were ambiguous and did not provide the government an adequate basis for making a best value analysis. However, the defect is not one which warrants terminating the award to Rexon and reopening the competition after prices have been exposed, since there is no indication that any offeror was prejudiced by the defective solicitation. See Cenci Powder Prods., Inc., B-234030, Apr. 17, 1989, 89-1 CPD ¶ 381.

The Army discovered several ambiguities in the PIC provision. First, the Army states that it was not clear whether a contractor had to have a 90 percent on-time delivery rate for both open and recently completed contracts or if the contractor qualified if it had 90 percent on-time delivery for either its open contract(s) or its recently completed contract(s). In addition, it was not clear whether the contractor had to have 90 percent on-time delivery for all open contracts averaged together or 90 percent on each open contract. The Army also found that if a contractor had both an open and a recently completed contract, the provision was ambiguous as to whether or not the contractor must have a 90 percent rating on each of those contracts or if the total cumulative score must be at least 90 percent.

Second, the Army states that it was not clear what was meant by "open contracts." It could mean contracts where deliveries are not complete or it could mean contracts which had not been administratively closed out, even though all items had been delivered and accepted. The Army states that this could affect the quality rating since it is determined by evaluating "all current open contracts."

The Army states that it also discovered that because of limitations on the database, the evaluation of past deliveries was based on current/revised schedules rather than original delivery schedules. Reliance on this database might not lead to an equitable result for the purposes of PIC since the delivery schedule may be revised for delays which were not government caused. Contractors were considered to be 100 percent on-time if there were any government delay with no consideration given to excusable delays as opposed to government caused delay in calculating the percentage of on-time delivery. The Army also discovered that on-time delivery was calculated by counting as on-time all items

delivered within 30 days of the delivery date, although the PIC provision did not mention this "grace period." The Army further discovered that determining the date when deliveries had been made in some circumstances was difficult because certain contracts were unclear as to the required delivery schedule. To correct these problems, the Army concluded that its entire database had to be changed.

Lastly, the Army reports that there also existed confusion as to which contracts should be included in a PIC evaluation where contractors may have more than one facility or have undergone changes in corporate structure over the years.

We agree with the Army that the PIC provision is subject to several reasonable interpretations and, depending on how the provision is interpreted, Rexon may or may not be PIC qualified. For example, the PIC provision requires 90 percent on-time delivery of "open contracts." If open contracts means those with deliveries not completed, Rexon had two open contracts to be considered in the evaluation. If on-time means the contract schedule dates and the 30-day grace period is not used, as it was originally, one contract was 84 percent delinquent, or 16 percent on-time and the other was 58 percent delinquent, or 42 percent on-time. Thus, Rexon would not be PIC qualified. While Rexon objects to this analysis, Rexon's objections center around the very factors which led to the agency's conclusion that the provisions were ambiguous. Rexon argues that the analysis showing Rexon is not PIC qualified is faulty because the results are arrived at by (1) omitting deliveries on one contract based on the Army's interpretation of the PIC provision, (2) disregarding Government-caused delay, and (3) carefully selecting only those interpretations of the PIC provision that would produce unfavorable results. In our view, Rexon's concerns only support the Army's view that the PIC provision was defective.

Also, there is another unclear aspect of the PIC provision which calls into question Bulova's PIC eligibility. Although Bulova was originally determined to be PIC qualified under one interpretation of the provision, the record shows that Bulova itself may not qualify for the PIC preference. The initial evaluation of Bulova did not take into consideration that Bulova had purchased Hamilton Technology, Inc., another fuze manufacturer, and that Bulova would be performing this contract at the Hamilton facility. If contracts performed at the Hamilton site were taken into consideration, Bulova would not have met the 90 percent on-time delivery requirement and would therefore not be PIC qualified. Bulova argues that the facility's prior history should not be considered, since it is now under Bulova's management. We find reasonable the Army's position that such information could be considered, because other factors aside from management, could contribute to the

quality and timely delivery of fuzes at the Hamilton facility. Bulova also disputes the Army's analysis that one Hamilton contract failed the 90 percent on-time delivery requirement. However, the issue involves whether the delay was the result of government action. The PIC provision did not address how allegation of government delay would be resolved for PIC qualification.

Although the PIC provision clearly was defective, this record fails to establish any reasonable possibility of prejudice to the parties as a result of that defect which would warrant the corrective action taken by the Army. Under the PIC provision, the Army was to determine, after submission of offers, whether a contractor met the PIC criteria based on historical past performance data. The identity and PIC status of competitors were not revealed until after award. Consequently, we believe that any ambiguity in the PIC provision did not affect how an offeror structured its proposal, since an offeror did not know prior to submitting its offer whether or not it or any other potential competitor was PIC qualified. No firm, in submitting an offer, was certain of its entitlement to the evaluation preference, and thus no firm could reasonably rely on receiving the preference. Moreover, Bulova does not argue that it would have structured its offer differently had it known the PIC provision would not apply or that it would not be considered PIC qualified. The Army itself specifically states that "although PIC may not have affected how a contractor submitted its proposal, the PIC provision did affect how the government performed its evaluation of offers and who would be entitled to award."

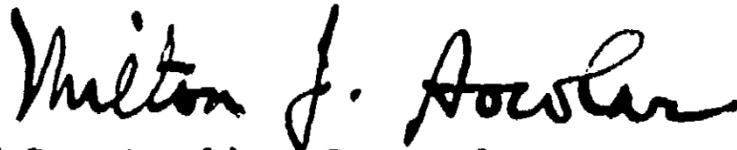
In resoliciting, the agency intends to make award based on low price. Rixon submitted the low, technically acceptable offer under the original solicitation. The Army does not contend, nor does the record show, that the elimination of the PIC provision would materially affect the field of competition, since this procurement was at all times limited to mobilization base producers. Thus, award under the original solicitation will meet the Army's need and there is no evidence that any offeror was prejudiced by an award under the initial solicitation based solely on low prices.

The Army also provided in the resolicitation for the possibility of two awards for mobilization base purposes. The record shows this to have been an issue that arose after the decision to terminate Rixon's contract and resolicit. The agency does not state that this is an independent basis for termination and resolicitation, but rather states it is a factor which mitigates the adverse effect of a possible auction. To the extent the Army might now propose to terminate for convenience Rixon's contract in order to satisfy a need to maintain more than one mobilization base producer, our decision does not

address the propriety of that action. Our jurisdiction extends to reviewing the reasonableness of the termination for convenience decision based on an improper initial award, and here, we find that the termination of Raxon's contract based on flaws in the original award was improper.

Since resolicitation here would simply promote an auction among the offerors without any corresponding benefit to the procurement system, we find that termination of the award and resolicitation were not justified. Accordingly, we recommend that the Army reinstate the award to Raxon unless it determines under its contract administration authority to terminate the contract for reasons other than flaws in the original solicitation. We also find that Raxon is entitled to recover the costs it incurred in filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

The Raxon protest is sustained and the Bulova protest is denied.



~~Acting~~ Comptroller General
of the United States