



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

Decision

Matter of: Dairy Maid Dairy, Inc.
File: B-251758.3; B-252489; B-252489.2
Date: May 24, 1993

Michael L. Sterling, Esq., and Howard W. Roth, III, Esq., Vandeventer, Black, Meredith & Martin, for the protester. Dennis J. Riley, Esq., Michael W. Kauffman, Esq., and Andrew B. Katz, Esq., Elliott, Vanaskie & Riley, for Contact International Corporation, an interested party. Major Bobby G. Henry, Jr., and Charles J. Wilder, II, Esq., Department of the Army, for the agency. Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency issued amendment materially changing terms of solicitation (from a requirements type to a definite quantity procurement) after the receipt of best and final offers (BAFO) but failed to request additional round of BAFOs to provide offerors a reasonable opportunity to revise offers to reflect changed requirements and record shows that competitive standing of offerors might have been different if given the opportunity to respond to solicitation's changed requirements.

DECISION

Dairy Maid Dairy, Inc. protests the award of a contract by the Department of the Army to Contact International Corporation under request for proposals (RFP) No. DAJB03-93-R-0072, for the operation of the Eighth U.S. Army Milk Plant in Korea. Dairy Maid initially challenges the propriety of the terms of the RFP, as well as the terms of another solicitation, RFP No. DAJB03-93-R-0002, for similar services. Dairy Maid protests the agency's failure to request a second round of best and final offers (BAFO) from the two offerors after issuing an amendment to the terms of RFP No. 0072 subsequent to the receipt of the offerors' BAFOs. The protester further contends that the award was improper because the awardee, Contact, submitted an unbalanced bid which does not include prices for the supply of milk powder in excess of amounts to be provided by the agency that may be required for contract performance, in contravention to the terms of the RFP.

We deny Dairy Maid's pre-award protests and sustain the post-award protest on the grounds that the protester was deprived of a reasonable opportunity to respond to a material amendment to the solicitation.

RFP No. 0002 was issued on November 23, 1992, for the operation and maintenance of the milk plant, including the production and delivery of dairy products and the provision of backhaul services. RFP No. 0002, as initially issued, contemplated the award of a requirements contract for the milk plant services for a 6-month base period from April 1, 1993, to September 30, 1993, with a 1-year option period from October 1, 1993, to September 30, 1994.

Dairy Maid, the incumbent contractor of the required services whose current contract was scheduled to expire on March 31, 1993, protested the terms of RFP No. 0002 to our Office prior to the closing time for the receipt of proposals. (The initial protest, B-251759.1, filed on December 22, 1992, was consolidated into B-251758.2, Dairy Maid's subsequent protest, filed on January 7, 1993.) Finding that Contact, the previous incumbent of the services from 1979 to 1992, had improperly not been solicited under RFP No. 0002, the agency extended indefinitely the closing date for the receipt of proposals. By letter of January 21, 1993, the agency sought dismissal of Dairy Maid's protest in light of the extended closing date and submitted a memorandum to our Office stating that the agency would consider the protester's challenges to the terms of the RFP; the Army reported that it was substantially revising the solicitation. On January 22, we dismissed the protest as academic since the contracting agency had granted the relief requested by Dairy Maid. (Although the protester sought cancellation of the RFP and resolicitation of the requirement on substantially revised terms, we considered the agency's representations of its planned revision of the RFP's terms a sufficient basis to warrant dismissal of the protest.) That memorandum also stated: "[w]e will negotiate with Dairy Maid a 6-month extension [to its current contract] to allow plenty of time for amendment, reparation of proposals, audit, negotiations, award and phase-in." RFP No. 0002 was thereafter amended to provide for a base performance period from October 1, 1993, to September 30, 1994, and an option period from October 1, 1994, to September 30, 1995.

While negotiations were initiated with Dairy Maid for the contemplated sole-source, 6-month extension of its contract, during which time the protester submitted four alternate proposals to the agency to extend its contract, the agency received notice from Contact of its interest to compete for the same 6-month requirement. By letters of February 16, Dairy Maid and Contact were notified by the contracting

officer of the agency's intent to issue a competitive solicitation for a 6-month base period, with a 6-month option period, which would be identical to the terms of RFP No. 0002, except that the new solicitation "will be a guaranteed minimum of 75 percent of the estimated quantities shown [in RFP No. 0002]. The new solicitation, RFP No. 0072, was issued on February 17.¹ Copies of RFP No. 0072 were sent to Dairy Maid and Contact by express mail on February 22 and were received by the firms on February 23.

RFP No. 0072, as issued, provided "estimated quantities," also considered the "guaranteed minimums," for multiple line items representing the dairy products and backhaul services required under the RFP's contemplated requirements type contract. The solicitation's scope of work provided that:

"[t]he [c]ontractor shall utilize 757,700 [pounds] of skim milk powder issued by the [g]overnment, prior to using the [c]ontractor furnished milk powder. It shall be the responsibility of the [c]ontractor for the purchase and delivery of milk powder once the [g]overnment furnished powder is consumed."

Offerors were advised that award was to be made under RFP No. 0072 to the responsible offeror submitting the lowest offer which meets all terms and conditions set forth in the solicitation. The RFP incorporated Federal Acquisition Regulation (FAR) § 52.217-05, providing for the evaluation of offers for award purposes by adding the total price for the option period to the total price for the basic requirement, although the government was not obligated to exercise the option.

Proposals were received from Dairy Maid and Contact by the March 1 closing date. Discussions were conducted with both firms; among other things, each offeror was asked to "insure that [its] proposal includes cost for any milk powder required beyond the quantity to be [g]overnment [f]urnished." By letter of March 7, Dairy Maid confirmed

¹Dairy Maid contends that the issuance of RFP No. 0072 was improper because the Army had agreed to award the protester a sole-source, 6-month extension to its current contract to meet the same requirement. We cannot find that the Army's actions in pursuing a competitive procurement for this interim period was improper given Contact's express interest in performing the required services and the capability of the firm (which had provide^d these services for a number of years before Dairy Maid) to perform within the required time limitations.

that any milk powder required in excess of the 757,700 pounds to be provided by the government "will be at contractor expense." By letter of March 8, Contact advised the Army that the firm would be responsible for providing the milk powder beyond the 757,700 pounds to be supplied by the government:

"so long as the contract line item volumes were within the [g]overnment estimates provided in the solicitation. Should contract requirements exceed those estimated in the solicitation, however, Contact International would purchase the additional [milk powder] necessary on a reimbursable basis by the [g]overnment. Conversely, the [g]overnment could simply choose to supply, at no cost to Contact International, any additional [milk powder] necessary to produce contract requirements in excess of the estimated contract line item quantities."

BAFOs were received by March 11. On March 16, the contracting officer issued amendment No. 1 to RFP No. 0072. That amendment added the clause at FAR § 52.216-20, Definite Quantity, to the solicitation and stated that the requirements clause in the RFP only applied to the RFP's backhaul services. Amendment No. 1 further provided that the RFP was amended as follows:

"[b]y deleting the wording Estimated and Guaranteed Minimums as they appear over Quantities set forth in [the schedule] of the solicitation. These shall be firm quantities with estimated delivery dates. The clause entitled 'Definite Quantity' shall govern [T]he contractor shall not be required to [make] any deliveries under this contract after [September 30, 1993]."

Each offeror was sent a copy of amendment No. 1 by telefacsimile transmission on Tuesday, March 16, with the following instructions: "Please acknowledge amendment by signature and return by fax. Please state there is no price change as a result of amendment."

Contact acknowledged, by telefacsimile message of March 16, its receipt of the amendment, stating that its BAFO prices remained unchanged by the amendment. By telefacsimile message of Thursday, March 18, Dairy Maid acknowledged its receipt of amendment No. 1, but stated that the firm could not confirm "that the amendment will not change our prices because we do not understand the amendment." Dairy Maid pointed out that although the definite quantity clause was added to the RFP, the solicitation still designated the contemplated award as a requirements contract. Dairy Maid

requested clarification of the amendment's effect on the contract type, the impact of any change in contract type on the contractor's rights and responsibilities, and the propriety of the amendment's provision of September 30, 1993, as the last day of performance. By telefacsimile message of Friday, March 19, the contracting officer advised Dairy Maid that:

"[t]hat part of the contract covering dairy products will be governed by the Definite Quantity clause. These quantities are fixed. The backhaul service is governed by the Requirements clause. These quantities are estimated requirements. The date of [September 30, 1993] at the end of the incorporated clause is correct. This is a Fixed Price Contract with a 'Definite Quantity' portion as well as a 'Requirements' portion."

On Monday, March 22, Dairy Maid sent a telefacsimile letter to the contracting officer stating that amendment No. 1 represents "a major change in contract format" from "a 'requirements' to a 'definite' quantity type contract arrangement" which "will require Dairy Maid to reprice its proposal. This will take at least ten work days." That telefacsimile message also confirmed Dairy Maid's willingness to accept an award of a requirements contract under the terms of its original proposal. By telefacsimile letter of March 22, Contact confirmed that if awarded the contract, it was "capable of commencing performance effective [April 1, 1993], so long as the contract is awarded not later than [March 31, 1993]."

On the same day, March 22, the Deputy Assistant Secretary of the Army approved a determination to award the contract despite Dairy Maid's pre-award protests to our Office due to urgent and compelling circumstances which significantly affect the interests of the government, citing the need for delivery of the dairy products to troops and facilities without a break in service after Dairy Maid's current contract's expiration on March 31. The Army concluded that these circumstances would not permit awaiting the issuance of a decision by the General Accounting Office on Dairy Maid's protests. The determination and findings prepared to support the decision to award the contract explained that although a requirements contract was originally contemplated by the RFP, no offeror would be prejudiced by the conversion to a definite quantity contract, per amendment No. 1, since it appeared that both offerors had priced their proposals on the estimated minimum quantities stated in RFP No. 0072 as if they were in fact definite quantities.

The agency did not respond to Dairy Maid's March 22 notice that it had to reprice its proposal in light of the solicitation requirement changes introduced by amendment No. 1. Instead, an award was made to Contact on March 23 in the amount of \$1,834,965.01 for a 6-month performance period, with a 6-month option period (priced at \$1,833,203.41, "should it be exercised.") Contact's total BAFO price, for the base period and option period combined, was slightly lower than Dairy Maid's total BAFO price for those periods. On March 24, Dairy Maid filed a protest with our Office against the Army's award to Contact, alleging, among other things, that Dairy Maid had not been given a reasonable opportunity to revise its proposal to respond to material solicitation changes introduced by amendment No. 1 after the receipt of BAFOs.²

The Army states that when RFP No. 0072 was issued, the acquisition was intended to be an indefinite quantity contract in which the guaranteed minimums would represent 75 percent of the stated maximum quantities. The agency reports, however, that it inadvertently omitted the maximum quantities and the general indefinite quantity provision at FAR § 52.216-22. Having found that the "offers by Dairy Maid and Contact are based entirely on the 'guaranteed minimums' as if they were definite quantities," the agency "correct[ed] the omission by amending [the RFP] to make the guaranteed minimums merely definite quantities of the dairy products" The Army further reports that:

"the milk powder furnished by the [g]overnment is considered sufficient only for about the quantities stated in RFP [No.] 0072. Both offerors calculated their proposals based primarily on that amount of milk powder as the total required for the base period."

²On March 30, Dairy Maid requested injunctive relief from the United States District Court for the Eastern District of Virginia. On the same day, the Court ordered the Army to stay performance of Contact's award, and to extend performance under Dairy Maid's current contract, until such time as the Court issued an additional order. By order of April 13, the Court held the Army's failure to direct the cessation of performance of Contact's award subsequent to the filing of Dairy Maid's post-award protest, and its failure to issue a required justification for that determination, to be contrary to law. The Court therein ordered the Army to extend the protester's existing contract for the operation of the milk plant and backhaul services until the issuance of an expedited decision by our Office on the merits of Dairy Maid's pending protests.

The agency therefore considered the changes introduced by amendment No. 1 to be a matter of "formality" and concluded that since the amendment merely clarified the terms of the solicitation, no substantive change was involved to require any additional time for repricing of offers.³

FAR § 15.606(a) states that when there is a change in the government requirements either before or after the receipt of proposals, an amendment shall be issued and the offerors are to be provided an opportunity to submit revised proposals. General Eng'g Serv., Inc., B-242618.2, Mar. 9, 1992, 92-1 CPD ¶ 266. We have found that a compelling reason exists to request a second round of BAFOs where a post-BAFO amendment materially changes the government's requirements as to quantity. Harris Corp., B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276; Kisco Co., Inc., B-216953, Mar. 22, 1985, 85-1 CPD ¶ 334.

The Army concedes that a change in contract type from a requirements contract to a definite quantity contract generally involves a material change to the solicitation's terms. The Army contends, however, that this change, per amendment No. 1, was not material to the terms of the current procurement, and thus no offeror was affected by the change in terms, since both offerors' proposed prices were calculated on the stated estimated minimum quantities as if they were definite quantities.

As discussed further below, we believe the Army improperly failed to allow the offerors a reasonable opportunity to revise their BAFOs, if desired, after the issuance of amendment No. 1. That post-BAFO amendment changed the terms of the solicitation from a requirements contract, which placed a risk on the contractor that the government could place orders above the minimums, to a definite quantity type contract, which established the quantities the government

³The agency requests dismissal of Dairy Maid's protest against the award of the contract and the agency's failure to allow the protester a reasonable amount of time to revise its proposal in response to amendment No. 1 because the award was made and the protest was filed on March 23 and March 24, respectively, whereas the protester's offer had only been extended until March 19. The agency therefore contends that Dairy Maid's offer expired by its own terms. Based upon the record before us, however, we cannot conclude that Dairy Maid is not an interested party for the purposes of protesting these issues, as the Army contends, since at all times after it submitted its initial offer, Dairy Maid expressed its continued interest in pursuing its offer for the award of a contract under RFP No. 0072, including the pursuit of its protests.

would purchase. It thus materially changed the degree of potential risk to be assumed by the contractor. The record further shows that the protester relied upon the original solicitation language which indicated the contract was for a requirements contract, and that the estimates were only minimums, in the calculation of its proposed price.

In its response to the agency report, Dairy Maid refutes the Army's determination that it submitted its BAFO based upon the RFP's stated estimated minimums as if they represented definite quantities. The protester's calculations show that the firm first determined how much milk powder in excess of the amount provided by the government would be necessary to meet the agency's guaranteed minimum quantities and then multiplied that amount by a "conservative" percentage to account for the risk involved in a requirements type contract, since under the terms of the RFP, the Army was free to place orders in excess of the stated estimated minimum quantities. Dairy Maid contends that the firm would have submitted a substantially lower price proposal had it not been required to evaluate its potential obligations under a requirements contract.

The RFP, as amended, limits the contractor's business risk regarding required quantities because, as a definite quantity contract, the Army will be purchasing set amounts. Although the Army believed that both offerors' proposed prices were based upon the stated estimated minimum quantities, the agency has not provided any evidence to support that conclusion. Dairy Maid's proposal clearly included the firm's estimate, and resulting additional expense, for the amount of milk powder in excess of the government's supply which was considered necessary to meet those orders in excess of the stated minimum quantities that reasonably were anticipated under the original requirements type terms of the RFP.

Our review of the calculations prepared by the protester shows that the protester's application of the multiplication factor used to estimate the agency's potential requirements in excess of the stated minimum quantities resulted in an increase in price which is sufficient, given the relatively slight difference in price between the two offerors' proposals, to affect the relative standing of the offerors. Thus, we conclude that the change in contract type and its effect on the RFP's required quantities were material in the context of this solicitation. In view of the close proximity of the offerors' prices, Dairy Maid was prejudiced by the agency's failure to allow it a reasonable opportunity to revise its proposal after its review of the terms of amendment No. 1-- it is not clear that the outcome of the competition would have remained the same had the protester

been provided an opportunity to revise its proposal. See, e.g., Information Ventures, Inc., B-245128, Dec. 18, 1991, 91-2 CPD ¶ 558. Accordingly, we sustain this basis of protest.'

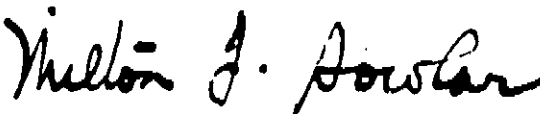
Dairy Maid's pre-award protests contend that numerous specifications in the two solicitations, RFP Nos. 0002 and 0072, are deficient. Many of these allegations (e.g., regarding the accuracy of the stated estimated quantities of RFP No. 0072), as well as the post-award protest of the alleged unbalancing of Contact's proposal, have been rendered academic by the issuance of amendment No. 1 and our decision sustaining the protest on other grounds, respectively. We have reviewed the remaining RFP provisions challenged by the protester for lack of information or ambiguity and we believe the information given is sufficient for the two offerors, both previous providers of the services, to meaningfully compete for the award. For instance, Dairy Maid challenges the provision concerning the government's reimbursement of the contractor's employees' tuition for the education of their dependents. Even though the agency has agreed to bear the cost of the dependent's education, Dairy Maid seeks exact figures on the number of employees affected. The offerors, however, as incumbent contractors, should have sufficient historical information in this regard; we do not think the information Dairy Maid seeks prevents it from competing. Also, although Dairy Maid requests information about the exact type of date coding system required to stamp the dairy products with expiration dates, the agency's directions indicate that the contractor is responsible to stamp the dairy products in a mutually agreeable, commercially acceptable manner. Similarly, equipment maintenance levels were adequately described as those required for acceptable performance levels of

'We note that the scope of work of RFP No. 0072 places the responsibility on the contractor to furnish, at its own expense, milk powder in excess of the government furnished amount of 757,700 pounds. Contact stated in its offer that it would furnish the milk powder for the definite quantities only and charge the government for any additional milk powder needed. The agency accepted Contact's terms. Dairy Maid priced its offer to include a contingency based on its view that the 757,700 pounds would not cover the option period and it would have to purchase additional quantities of milk powder. It is unclear from the agency's submissions whether or not, by its acceptance of Contact's terms, the Army believes the 757,700 pounds to be furnished is sufficient to cover the definite quantities for both the base and option periods. We think the agency should confirm the adequacy of the 757,700 pounds of milk powder to meet its needs.

operation to meet the production requirements. The mere presence of risk in a solicitation does not render it inappropriate, and offerors are expected to consider the degree of risk in calculating their prices. A&C Bldg. and Indus. Maintenance Corp., B-230270, May 12, 1988, 88-1 CPD ¶ 451.⁵

By letter of today, we are recommending that the agency request a second round of BAFOs from the two offerors. If after the evaluation of the new BAFOs, Contact's proposal is no longer considered in line for award, the agency should terminate Contact's contract for the convenience of the government and award the contract to Dairy Maid, if otherwise proper. We also find that the protester is entitled to recover the costs it incurred in filing and pursuing its post-award protest of the issue herein sustained. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1) (1993).

The protest is sustained.

for 
Comptroller General
of the United States

⁵We also find no merit to Dairy Maid's contention that RFP No. 0002 improperly failed to provide technical evaluation factors for award; technical evaluation factors were not applicable to RFP No. 0002--the only factors to be considered by the agency in its award determination were local contractor status, compliance with the RFP's terms and the proposed prices, as set forth in the RFP.