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**Comptroller General
of the United States**

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

Decision

Matter of: PPCSC/RAC BENNING JV 1

File: B-296239

Date: July 19, 2005

John E. Jensen, Esq., and Devon E. Hewitt, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.

Bryan C. Naquin, Esq., and Lloyd R. Crosswhite, Esq., Department of the Army, and Kenneth Dodds, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency decision to include clauses applicable to both construction work and supply work in a solicitation for a complex of prefabricated modular structures that included both types of work was reasonable where the solicitation divided the work into separate line items, many of which were for construction and many for supply.

DECISION

PPCSC/RAC BENNING JV 1 protests the terms of request for proposals (RFP) No. W9126G-05-R-0013, issued by the United States Army Corps of Engineers, for design and construction of a complex of prefabricated temporary modular structures at Biggs Army Airfield, Fort Bliss, Texas.

We deny the protest.

The RFP, issued April 4, 2005, sought proposals for design and construction of a complex of prefabricated modular structures to accommodate a large combat unit arriving at Fort Bliss. The scope of the project was for the design and construction of a complete complex, including the assembly of prefabricated structures, to serve as barracks, dining, vehicle maintenance, classroom and administrative facilities, as well as site development, which entailed clearing and grubbing; constructing roadways, parking areas, sidewalks, curbs, and utilities supporting the structures (for example, sewer, storm drainage, gas, water, electrical); and landscaping.

The project was divided into four “construction phases,” each with a separate completion date, with the final completion date occurring on January 27, 2006. The first 6 line items in the price schedule comprised the base bid and there were 35 optional line items. The 6 base bid line items and the first 6 option line items required prices for the vast bulk of the site-preparation work. The remaining option line items primarily reflected the work associated with providing and installing the prefabricated structures. The solicitation, as issued, required the successful contractor to furnish both performance and payment bonds acceptable to the government at 100 percent of the original contract price (including options exercised at the time of award), as a condition of award.

Award was to be made on a “best-value” basis, considering four technical evaluation factors and price. The technical evaluation factors were design and construction past performance, corporate relevant specialized experience, management effectiveness (evaluation of proposed personnel and project management plan), and project duration (evaluation of proposed project schedule). Both the design and construction past performance and corporate relevant specialized experience factors contemplated considering offerors’ construction experience on projects within the last 5 years.¹ The first three listed technical evaluation factors were of equal importance, while the fourth factor was worth more than the total weight of the first three factors. Price was approximately equal to the combined weight of the technical factors.

PPCSC/RAC, a HUB (Historically Underutilized Business) Zone small business, which supplies and installs prefabricated modular structures, protested that the Corps had improperly characterized the acquisition as one for construction, instead of supply, and had failed to set aside the procurement for small businesses. In its protest, PPCSC/RAC argued that the Corps should have solicited the contract as a supply contract, with the appropriate terms and clauses, instead of the construction clauses, because the predominant effort under the contract involves supplying prefabricated modular structures.² PPCSC/RAC contended that because the supply work is the predominant work, the Corps was required to solicit the contract as one

¹ The design and construction past performance factor entailed an evaluation of offerors’ past performance on the basis of quality of construction, timeliness of performance, customer satisfaction, subcontractor management, documentation, and safety record. The corporate relevant specialized experience factor entailed considering offerors’ construction experience with completing a design/build project on the basis of similar projects, design/build experience, and military construction experience.

² The protester asserts that the General Services Administration and the Department of Defense have classified procurements for providing and installing prefabricated modular structures, including site preparation, as procurements for supplies.

for supply and to delete all the clauses in the solicitation associated with construction, in particular the requirements for performance and payment bonds and the evaluation criteria providing for the evaluation of offerors' construction experience. In the alternative, PPCSC/RAC maintained in its protest that the project should be viewed as divided into two parts and clauses applicable to both the construction work and to the supply work should be included.

In response to PPCSC/RAC's protest, the Corps determined that the contract would be a "hybrid contract with features which were uniquely construction in nature and features which were supply in nature." Agency Request for Summary Dismissal at 3. Consequently, pursuant to Federal Acquisition Regulation § 36.101(c)(2), the Corps divided the contract work into two parts, and issued an amendment to the RFP to add the applicable supply contract clauses and to reduce the amount of the performance and payment bonds from 100 percent of the original contract price (estimated at approximately \$180 million) to \$48 million (estimate of construction portion). The Corps also undertook a new market survey of small businesses based on the lower bonding requirements, and determined that none of the 20 firms that it located that met the bonding requirements were capable of carrying out a project of this size, and continued the procurement on an unrestricted basis.

We solicited the views of the Small Business Administration (SBA), which opined that it did not appear that the Corps had used reasonable efforts to identify HUBZone small businesses capable of performing the requirement to determine whether or not this procurement should have been a HUBZone set-aside.

Our Office then conducted a conference to provide "outcome prediction" alternative dispute resolution (ADR) to the parties. In this conference, the GAO attorney handling the protest expressed concern that the record before us showed that the Corps had not used reasonable efforts to identify HUBZone small businesses capable of performing the requirement, particularly given the lower bond levels now required. In response, the Corps "propose[d] to take corrective action by conducting a new market survey to determine whether there is a reasonable expectation of receiving offers from at least two HUBZone small businesses capable of performing the work and whether an 8(a) or Veteran Disabled Small Business set-aside would be required under [Federal Acquisition Regulation] part 19." Army Corrective Action Letter. Accordingly, we partially dismissed the protest insofar as it challenged the Corps's decision not to set aside the requirement for small businesses.

In that same ADR conference, the GAO attorney handling the protest stated that he viewed it as unlikely that PPCSC/RAC would prevail on the remainder of the protest grounds because the record evidenced that the agency had reasonably exercised its discretion in dividing the contract into construction and supply sections, including both the applicable supply and construction clauses in the solicitation, and lowering but retaining the bond requirements. PPCSC/RAC elected not to withdraw these protest grounds.

As recognized by the parties, the determination of which clauses are the appropriate ones to include in a contract is governed by FAR § 36.101(c), which provides:

A contract for both construction and supplies or services shall include--

- (1) Clauses applicable to the predominant part of the work (see Subpart 22.4) or
- (2) If the contract is divided into parts, the clauses applicable to each portion.

FAR § 22.402 provides that the construction labor standards are applicable where the construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from the other work required by the contract.³ The contracting agency has the discretion to determine whether a contract is one principally for construction or one for supplies, and we generally will not disturb this agency judgment, where it was made in good faith. See Abbott Power Corp., B-190067, Dec. 6, 1977, 77-2 CPD ¶ 434 at 3.

In response to the protest, the Corps here determined, consistent with the suggestion made in the original protest, that the procurement involved the award of a hybrid contract divisible into separate parts, such that both construction clauses and supply clauses should be included. While PPCSC/RAC now argues that the solicited work was not clearly divisible given that the statement of work does not divide the work, our review confirms that the bulk of the construction work was limited to the first 12 line items comprising the base bid and the first 6 option line items, whereas the supply work basically constituted the remainder of the options. In fact, the Corps reports that the most critical work is the construction, which must be completed (or substantially completed) before installation of the prefabricated modular structures is to take place. Thus, the record confirms that the agency could reasonably determine that the site-preparation construction work was sufficiently divided from the work involving installation of the prefabricated modular structures to satisfy the requirements of FAR § 36.101(c)(2).

While PPCSC/RAC also now argues that only supply clauses should be included pursuant to FAR § 36.101(c)(1) because that is the predominant part of the work, FAR § 36.101(c) gives the agency the discretion of either determining which clauses should be included based upon the predominant part of the work to be performed

³ “‘Construction’ means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. . . . Construction does not include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property.” FAR § 2.101.

under the contract or dividing the contract into severable parts, and does not preclude the agency from dividing the contracts into parts, even if supply work constitutes a larger percentage of the work.⁴ Thus, the Corps's decision here to include both the applicable supply and construction clauses in the RFP is consistent with the regulation.⁵

PPCSC/RAC also asserts that the evaluation scheme unduly focused on past construction experience, instead of giving weight to experience with installing prefabricated modular structures. Agency acquisition officials have broad discretion in selecting evaluation factors that will be used in an acquisition, and we will not object to the use of particular evaluation factors or an evaluation scheme so long as the factors used reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interest. FAR § 15.304; Olympus Building Servs., Inc., B-282887, Aug. 31, 1999, 99-2 CPD ¶ 49 at 3.

As noted above, the Corps here found that the construction work was the most critical aspect of performance of each phase of the contract because this work must be accomplished before the prefabricated structures can be installed and because the construction work effort must be expedited with an intensive commitment of resources in order to meet the agency's compressed schedule.⁶ The Corps explains that it therefore considered construction experience to be far more relevant than experience in providing and installing prefabricated structures in determining which

⁴ As noted by the SBA, the North American Industry Classification System code for commercial and institutional building construction included in this solicitation was not, and cannot now be timely, challenged.

⁵ While the protester here assumes that reclassifying the contract as one for supplies would require removal of the requirement to provide performance and payment bonds, whenever construction work in a contract exceeds \$100,000, as here, the Miller Act, 40 U.S.C. §§ 270a-270f (2000), requires the contracting agency to require performance and payment bonds. Because the construction work was estimated to exceed \$100,000, the Corps still would have been legally required to include the bonding requirement in the RFP's terms, regardless of whether it classified the contract as one for construction or supply. See TLC Servs., Inc., B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235 at 2-3. Here, the protester has provided no evidence that \$48 million is not a reasonable estimate for the construction portion of the contract. Thus, we have no basis to find the required bonding level for payment and performance bonds was unreasonable.

⁶ The Corps advises that the contract required all work to be completed within 239 calendar days, which considering the design work allowed approximately 207 days to complete the construction work. The Corps states that normally it would allow 660 calendar days to complete construction on a contract valued between \$40 and \$50 million.

offeror was the most qualified to successfully complete the project, notwithstanding that the supply work constituted the majority of the dollar value of the contract. Based on our review, we find the establishment of evaluation factors focusing on construction experience was a reasonable exercise of the agency's judgment.

The protest is denied.

Anthony H. Gamboa
General Counsel