

DECISION

95300
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

50589

FILE: B-181729

DATE: February 27, 1975

MATTER OF: AII Systems

DIGEST:

1. Contracting officer's oral request for best and final offers was allegedly interpreted by protester as permitting only upward price revisions necessitated by compliance with a certain specification requirement. Since protester is chargeable with notice that procurement regulations require that offerors be given unrestricted opportunity to revise price proposals in submission of best and final offers, protester's contrary interpretation provides no basis for disturbing award.
2. Procuring agency is advised to take action to preclude future failures to request best and final offers in writing and in the form prescribed by ASPR § 3-805.3(d).

AII Systems (AII) protests the award of a contract pursuant to request for proposals (RFP) F33615-74-R-0142, issued at Wright-Patterson Air Force Base, Ohio, for the procurement of an Aircraft Space Position Measurement System (ASPMS).

Six proposals were received and found to be within the technical competitive range. In order to assure price competition, best and final offers were requested from all six offerors by June 18, 1974. The two low offers submitted by that date were as follows:

Telephonics	\$585,980
AII	\$595,000

The Air Force reports that it was concerned that the apparent low offeror, Telephonics, did not meet certain specifications requiring a "real time" system, and that this possible deficiency may have resulted from that offeror's compliance with an Air Force suggestion to reduce the number of ground stations. Thus on June 24, 1974, each offeror was telephoned by the contracting officer and was asked to confirm in writing by June 26 that its proposal met the "real time" requirement. The extent to which each offeror was permitted to revise its price proposal is the principal issue in this protest.

The responses received by June 26 changed the order of the offerors from that of June 18. Telephonics, apparently as a result of revising its proposal to meet the "real time" requirement, raised its price by \$19,405. Cubic lowered its price by \$60,745. The other four offerors, including AII, left their prices unchanged. Therefore, the order of the three low offerors as of June 26 was:

Cubic	\$589,250
AII	\$595,000
Telephonics	\$605,385

Cubic was awarded the contract on June 28, 1974.

The initial issue presented by this protest is whether it was timely filed under our Interim Bid Protest Procedures and Standards, 4 C.F.R. § 20.2(a) (1974), which provide in pertinent part:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to the bid opening or the closing date for receipt of proposals shall be filed prior to the bid opening for the closing date for receipt of proposals. In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier."

The Air Force and counsel for Cubic argue that to the extent AII maintains that the contracting officer improperly declined to confirm the new cut-off date in writing, that alleged impropriety was apparent on June 24 and thus the protest should have been filed prior to July 5, 1974. AII contends that it had no reason to be aware of any alleged improprieties prior to July 2 because it was not aware until then that Cubic had been allowed to lower its price proposal. We regard the essence of AII's protest to be that another offeror was permitted an unrestricted opportunity to revise and lower its proposal whereas AII construed the contracting officer's oral advice as not permitting such action. We agree that AII did not know and should not have known the basis for this contention prior to July 2, 1974. Its protest filed with our Office on July 5, 1974, was therefore timely.

As we have indicated, the thrust of AII's protest is that it understood the contracting officer's verbal instructions to be that offerors were limited to making upward price revisions necessitated by bringing a system into compliance with the "real time" requirement of the specifications. AII states that with this understanding, it reviewed its offer; determined that it complied with the specifications; and therefore confirmed its previously submitted price.

However, the contracting officer advises that the intention of his telephone call was not only to obtain confirmation that the "real time" requirement was met, but to provide each offeror with an unrestricted opportunity to revise its best and final offer.

We have had occasion in the past to consider a virtually identical situation in which the Government intended to advise an offeror of the opportunity to negotiate and of the deadline for submission of a best and final offer. B-176683(1) and (2), December 21, 1972. In the latter decision, after observing that a number of prior protests had reflected offerors' misunderstandings of oral advice, we stated:

"* * * We have not sustained protests based on the contracting officer's failure to provide written confirmation of request for best and final offers and the establishment of cut-off dates since the ASPR does not specify the manner by which offerors are to be notified of the closing of negotiations and we have considered verbal notification to be sufficient.

"However, * * * we have come to the conclusion that in order to avoid misunderstanding and confusion in the negotiating process, consideration should be given to amending the ASPR so as to require that requests for final offers and the establishment of cut-off dates be confirmed in writing, whenever feasible."

As a result of that recommendation, Defense Procurement Circular No. 110, May 30, 1973, amended Armed Services Procurement Regulation § 3-805.3(d) to provide:

"At the conclusion of discussions, a final, common cut-off date which allows a reasonable opportunity for submission of written 'best and final' offers shall be established and all remaining participants so notified. If oral notification is given, it shall be confirmed in writing. The notification shall include information to the effect that (i) discussions have been concluded, (ii) offerors are being given an opportunity to submit a 'best and final' offer and (iii) if any such modification is submitted it must be received by the date and time specified, and is subject to the Late Proposals and Modifications of Proposals provision of the solicitation." (Emphasis added.)

In the absence of the written confirmation required by the regulation, we are left with differing interpretations of the same telephone conversation. AII maintains that it understood the contracting officer's oral advice to be that the only price revision which would be permitted was an upward one necessitated by bringing a technical proposal into compliance with a certain specification requirement.

Acceptance of AII's interpretation would mean that not all offerors within the competitive range were being afforded an unrestricted opportunity for revision of price proposals. For example, under what AII states was its understanding, it was precluded from changing its previously submitted offer although it realized that at least some other offerors were being permitted to do so.

If the procurement was being conducted as AII states it understood it to be, the principles of ASPR § 3-805.3 (1973 ed.) governing competitive negotiations would clearly have been violated. Under these principles, when negotiations are conducted with several offerors, all offerors selected to participate are to be afforded an impartial and equitable opportunity to submit price, technical or other revisions.

We think offerors are chargeable with knowledge of the negotiation procedure required by regulation. It would have been more reasonable for AII to have concluded that the procurement was being conducted in accordance with those regulations, from which it follows that AII had been given an unrestricted opportunity to revise its price proposal, than for AII to have adopted an interpretation in conflict with the regulations. Under these circumstances, we do not believe that AII has provided a basis upon which we would be warranted in disturbing the award, and the protest is therefore denied.

Our denial of the protest, however, does not imply that we condone the Air Force's failure to request best and final offers in writing and in the form prescribed by ASPR § 3-805.3(d). We are advising the Secretary of the Air Force by letter of today that steps should be taken to preclude a recurrence of this deficiency in future procurements.


Deputy Comptroller General
of the United States