

DECISION

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

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98033

FILE: B-186424

DATE: September 15, 1976

MATTER OF: RKFM Products Corporation

DIGEST:

1. Although proposal was found technically acceptable, decision to exclude it from competitive range and from further negotiations was not arbitrary and unreasonable since award was to be made based on lowest price of technically acceptable proposals and it was unlikely that protester would have lowered its price sufficiently to make it reasonably competitive.
2. Protester's claim that it submitted an alternate proposal which would have placed it within competitive range and such proposal was not considered is rejected as there was nothing in the basic proposal to indicate the existence of an alternate proposal.
3. Modification of proposal received over 3 months after established date for receipt of proposals was properly excluded under terms of RFP and ASPR § 7-2002.4 (1975 ed.).

The RKFM Products Corporation (RKFM) protests the failure of the United States Army Armament Command, Rock Island, Illinois (Army), to include it in negotiations for the award of a fixed-price contract under request for proposals (RFP) No. DAAA-09-76-R-0037 and the subsequent award by the Army to another firm.

On December 17, 1975, the Army sent RFP's to 21 prospective offerors soliciting proposals for the design, layout, procurement and installation of production equipment and production support equipment and for the manufacture of certain quantities of M42 and M46 grenade parts. An additional 45 RFP's were requested from other prospective offerors after publication of the notice of the procurement in the Commerce Business Daily. Offerors were encouraged to submit proposals based upon a production capacity of 1.5 million grenade parts per month (item 0001), or 3 million parts per month (item 0002). The established date for receipt of proposals was February 23, 1976.

Of the 19 offerors submitting proposals on both items 0001 and 0002, 12 were found to be technically acceptable on item 0001 and 9 were considered technically acceptable regarding item 0002.

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The technically acceptable proposals and their respective prices as evaluated in accordance with section D of the RFP are outlined below:

Item 0001:

Norris Industries (Riverbank) (two proposals)	\$7,513,334 8,579,974
Kisco Co., Inc.	7,789,446
Norris Industries (Vernon)	8,773,407
Etamco	9,221,870
REDW (three proposals)	10,176,819 10,266,729 10,284,711
McLaughlin Body, Inc.	10,749,901
Martin Electronics	10,861,543
Thiokol	11,794,575
E. Walters & Co.	12,341,480
RKFM	14,068,856
Donovan Const. Co.	15,947,906
Honeywell	17,258,162

Item 0002:

Norris Industries (Riverbank) (two proposals)	11,873,842 13,447,411
Kisco Co., Inc.	13,356,734
Norris Industries (Vernon)	14,131,678
McLaughlin Body, Inc.	16,727,640

Item 0002:

Martin Electronics	\$19,427,283
Thiokol	22,363,860
RKFM	24,371,722
Donovan Const. Co.	25,914,040
Honeywell	29,643,749

After evaluating all of the technically acceptable proposals, the Army decided to negotiate with the first seven offerors submitting proposals under item 0001 and the first four offerors on item 0002. These offerors under each respective item comprised the competitive range of acceptable offerors eligible to participate in negotiations. In both cases, RKFM was excluded from the competitive range because of price and was precluded from participating in any negotiations with the Army.

By mailgram of April 27, 1976, RKFM protested to our Office its exclusion from negotiations contending that the Army's failure to include it within the competitive range was improper and an abuse of administrative discretion. RKFM's position can be summarized into three basic contentions:

- (1) The Army's decision to exclude its proposal from the competitive range was arbitrary and capricious;
- (2) That its offer contained an alternate proposal, which, if accepted by the Army, would have placed it within the competitive range;
- (3) In any event, it subsequently revised its pricing proposal with a late modification which, if accepted, would have placed it well within the competitive range.

RKFM concludes that it was entitled to the opportunity to compete equally for the award via negotiations and that it was unjustly deprived of this opportunity by the Army.

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Concerning the first contention that the Army's act of excluding RKFM from the competitive range was arbitrary and capricious, it is provided under 10 U.S.C. § 2304(g) (1970) that:

"* * * [P]roposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered* * *." (Emphasis supplied.)

With certain exceptions not relevant here, the Armed Services Procurement Regulation (ASPR) iterates the intent of the statute by requiring negotiations with all responsible offerors who submit proposals within the competitive range. ASPR § 3-805.1(a) (1975 ed.). The requirements for admission to and exclusion from the competitive range are defined by ASPR § 3-805.2(a) (1975 ed.) as follows:

"The determination as to which proposals are in a competitive range shall be made by the contracting officer. The competitive range shall be determined on the basis of price or cost, technical and other salient factors and shall include all proposals which have a reasonable chance of being selected for award. When there is doubt as to whether a proposal is within the competitive range, that doubt shall be resolved by including it. The initial number of proposals considered as being within the competitive range may be reduced when, as a result of the written or oral discussions, any such proposal has been determined to no longer have a reasonable chance of being selected for award." (Emphasis supplied.)

The Army included in the instant solicitation the following provision specifying the criteria upon which all proposals would be evaluated:

"D2 Basis for award:

"(a) Proposals received shall first be evaluated from a technical standpoint without regard to proposed costs. Those proposals which are considered to be technically acceptable or susceptible to clarification by further negotiation shall then be evaluated as set forth in paragraph (b) below.

"(b) Subsequent to the technical evaluation set forth in paragraph (a) above, proposals will be evaluated and awards will be made based on evaluation of out-of-pocket cost only* * *."
(Emphasis supplied.)

Our Office has repeatedly held that the determination of which proposals belong in the competitive range is primarily a matter of administrative discretion which will not be disturbed absent a clear showing of an abuse of discretion by the contracting agency. Riggins & Williamson Machine Co., Inc., B-182801, March 21, 1975, 75-1 CPD 168; 48 Comp. Gen. 314 (1968). Moreover, the price, as well as the technical acceptability of the proposal, may be considered in determining the competitive range and the price may emerge as the dominant factor in such a determination. Datawest Corp., B-185060, February 17, 1976, 76-1 CPD 106; Cf. 52 Comp. Gen. 382 (1972).

RKFM has clearly not met the required burden of showing that the Army is guilty of any abuse of discretion in failing to include it in the competitive range. The Army stated that RKFM's proposal was rejected because it was too high. The contracting officer responsible for the instant procurement noted that the breakpoint or line separating those included in the item 0001 competitive range from those excluded spans a gap of nearly one million dollars. The dollar spread of the seven offerors within the competitive range itself is approximately 3.3 million dollars. The spread between the low offeror in 0001 and the first offeror beyond the breakpoint is 4.2 million dollars.

In item 0002, the break is even more substantial. There is a 2.7 million dollar gap at the breakpoint with the first excluded offeror over 7.5 million dollars higher than the low offeror. We note too that in both items 0001 and 0002, RKFM was significantly higher than the lowest excluded offeror. In item 0001, RKFM's proposal was over 2.2 million dollars higher than Thiokol's. In item 0002, RKFM's price was nearly 5 million dollars beyond that submitted by Martin Electronics.

It would have been unrealistic of the Army to expect that RKFM would have lowered its proposal sufficiently to make it reasonably competitive. The contracting officer believed that RKFM did not have a reasonable chance of being selected for the award and RKFM has not submitted any evidence from which we may infer that the

Army's determination was arbitrary or capricious. We therefore cannot say, based upon the record before us, that the competitive range was unreasonably determined. The Army's determination that RKFM's proposal was outside the competitive range and had no reasonable chance of being selected was therefore not an abuse of discretion.

RKFM next maintains that it included an alternate proposal in its original offer that, had it been recognized and accepted by the Army, would have placed its price well within the competitive range. It implies that the Army's failure to recognize this alternate proposal constitutes an unreasonable exercise of administrative discretion. RKFM refers us to the following paragraphs of its proposal, which, it insists, contain the alternate pricing proposal; a proposal based upon the availability of Government-furnished equipment for its plant facility:

"All equipment furnished will be brand new, except toolroom equipment, which will be used in good working condition. (See Equipment List enclosed in Technical Data Package).

"Adequate and proper price adjustments will be made to basic line prices submitted in our proposal for item Nos. 0001AA and 0002AA for any and all equipment substitutions, additions, deletions, etc."

There is no prohibition against an offeror submitting an alternate proposal as long as it is not otherwise excluded by the RFP. Cf. Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD 312. RKFM asserts that the RFP clearly states that Government-furnished equipment could be substituted for contractor-furnished equipment. Although not specifically cited, RKFM is apparently referring to ASPR § 7-104.24(a) (1975 ed.) which is incorporated by reference in the RFP and states, in part, that the Government shall deliver to the contractor that property described in the attached schedule to the RFP.

Our Office will evaluate an agency's rejection of an alternate proposal in the same manner that it evaluates a primary proposal. The agency's refusal to recognize an alternate proposal or its rejection of that proposal is a matter of agency discretion which will not be disturbed absent a clear showing that its action was arbitrary or unreasonable. Midwest Telecommunications, Inc., B-184601, January 8, 1976, 76-1 CPD 12.

RKFM knew or should have known that its proposal would be evaluated on the basis of the use of Government-furnished property listed as an attachment to the RFP and as specifically provided by the RFP and ASPR § 7-104.249(a).

In our opinion, from the language contained in RKFM's proposal quoted above, it is not clear that the Army should have known that RKFM had made an alternate proposal. There is no mention of Government-furnished property in the proposal itself, nor any expressed intent to include or exclude such property from the proposal, nor are the words "alternate proposal" or the like specified or implied. There is nothing in the original offer that would put the Army on notice that an alternate proposal had been made. RKFM has not therefore shown that the Army's failure to recognize the alternate proposal was arbitrary or unreasonable.

Finally, RKFM contends that it subsequently modified its original proposal by telegram after the date for receipt of proposals but before award. This modification, had it been accepted, would have placed RKFM well within the competitive range.

The Late Proposals provision of ASPR § 7-2002.4 (1975 ed.), incorporated into the RFP by reference, states:

"(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made; and

"(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers * * *

"(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

"(iii) it is the only proposal received.

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"(e) Notwithstanding the above, a late modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted. * * *" (Emphasis supplied.)

RKFM's telegram of May 26, 1976, was properly rejected under the ASPR provision quoted above, as none of the exceptions permitting its consideration are applicable. We are of the opinion that the Army correctly concluded that a modification received over 3 months after the established date for receipt of proposals was not for consideration. Patty Precision Products Company, B-182861, May 8, 1975, 75-1 CPD 286.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States