

**DECISION**



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

60410

FILE: B-184679

DATE: January 22, 1976

MATTER OF: Bruno-New York Industries Corporation

~~099318~~  
99212

**DIGEST:**

1. Decision whether to make award on basis of initial proposals without discussion is essentially within discretion of contracting officer if the criteria for such an award are met. Here the contracting officer decided that the prices received were not "fair and reasonable" and, therefore, properly conducted negotiations.
2. Reduction in price after negotiations are held does not imply that offeror had access to prices submitted. Further, record is devoid of any evidence that "auction" techniques were used in this procurement.
3. Request for "best and final" offers is sufficient to constitute discussion as required under 10 U.S.C. § 2304(g) (1970).

On June 4, 1975, the United States Army Electronics Command, Fort Monmouth, New Jersey, issued request for proposals (RFP) No. DAAB07-75-R-2451 for the production of 900 Switchboard Accessory Kits, MX-230A/PT, on a firm-fixed price basis.

Of the four offerors submitting proposals Bruno-New York Industries Corporation (Bruno) submitted the initial low offer. However, the contracting officer, after reviewing the proposals submitted, determined the offered prices to be too high and thus, decided to negotiate with the offerors. All the offerors were contacted orally by telephone and given the opportunity to discuss possible proposal changes and revisions. On July 23, 1975, "best and final" offers were requested. All four offerors submitted best and final offers by the closing date, July 28, 1975. Bruno's best and final offer did not lower its price, although it did offer an improved delivery schedule and a 2-percent prompt payment discount. Quasar Microsystems, Inc. (Quasar), the second initial low offeror, reduced its price and thereby displaced Bruno as low offeror after best and final offers.

Bruno has protested to our Office against award to any other company arguing that it was the initial low offeror and had undergone a preaward survey by the Defense Contract Administration Service Region (DCASR), New York. Further, Bruno contends that the contracting officer conducted an auction by conducting negotiations and requesting best and final offers rather than awarding the contract on the basis of its initial low offer. Lastly, Bruno argues that it was not afforded an opportunity to discuss its offer during the negotiations.

Both 10 U.S.C. § 2304(g)(1970) and the implementing Armed Services Procurement Regulation (ASPR) § 3-805.1(a)(1974 ed.) require the contracting officer to conduct written or oral discussions with all responsible offerors in the competitive range, price and other factors considered. There are exceptions to the above rule where award may be made under certain situations on the basis of initial proposals. However, the law and regulations do not require an award be made without discussions, they only permit such an award if the criteria are met.

One of the criteria (which is the only possible one applicable in this case) is that it can be clearly demonstrated--from the existence of (1) adequate competition, or (2) accurate cost experience--that acceptance of the most favorable initial proposal, without discussions, would result in a fair and reasonable price to the Government. ASPR § 3-805.1(a)(v) (1974 ed.). The decision of whether award on the basis of initial proposals will result in a "fair and reasonable" price is essentially within the discretion of the contracting officer. See 53 Comp. Gen. 5 (1973).

The record indicates that the offered prices were evaluated by a contract price analyst. The report did not, as Bruno contends, determine that the price submitted by Bruno was fair and reasonable. The contract price analyst merely recommended accepting Bruno's low offer. However, the contracting officer determined that the lowest price offered was not a fair and reasonable price. Such a determination was based upon substantially lower unit prices for the same item procured in the past and the current rate of inflation since the last contract was awarded. The last contract awarded for this item was awarded on February 26, 1974, at a unit price of \$98.06. The Bureau of Labor Statistics, Department of Labor, advised that the rate of inflation (as estimated by the increase in the Consumer Price Index) had increased 14.7 percent from the time the last contract had been awarded. Accordingly, the contracting officer felt that a fair and a reasonable unit price for this item should be approximately \$115 to \$125 which was less than the prices originally submitted by any offeror.

For the reasons stated above, we must conclude that the conducting of negotiations in the procurement at issue is not subject to objection on the record before us.

Bruno next contends that the Army applied auction techniques to the procurement. Whenever negotiations are conducted with more than one offeror, auction techniques are prohibited, although it is permissible to tell an offeror that the Government considers its price to be too high. ASPR § 3-805.3(c)(1974 ed.). Our review of the record in this case does not establish that any auction techniques took place or that any other offeror received information about Bruno's price during negotiations. It is not uncommon for an offeror to withhold its lowest priced offer for the best and final offer. The mere fact that an offeror reduces its price during negotiations does not imply that the offeror had access to the prices submitted. Davidson Optronics, Inc., B-179925, February 22, 1974, 74-1 CPD 93. All offerors were free to revise their proposals, including price, in any manner deemed appropriate and we will not speculate as to the reasons why Quasar chose to reduce its price.

Alternatively, Bruno contends that conducting the preaward surveys on the initially two low offerors prior to calling for "best and final" offers revealed the relative positions of the offerors during negotiations and hence was an auction technique. The agency report does not lead us to a conclusion that the other offerors knew of the preaward survey of the two original low offerors. Further, there is no direct evidence to show that the survey caused the two low offerors' prices or relative standing to be disclosed. Therefore, the cases cited by Bruno which discuss the prohibition against "auction" techniques are not applicable to the present situation.

With regard to Bruno's contention relating to the paucity of negotiations for this contract, our Office has held that the mere request for best and final offers is considered sufficient to meet the requirement of the negotiation statute, 10 U.S.C. § 2304(g)(1970). Dyneteria, Inc., B-181707, February 7, 1975, 75-1 CPD 86, and cases cited in text. Since best and final offers were requested from all offerors, we see no basis to question the negotiation process in this regard.

Finally, Bruno alleges that it was informed by the buyer for the procurement that it was the low offeror and would receive the award shortly. The agency specifically denies this allegation and the report indicates that the buyer who allegedly promised the award to Bruno

B-184679

had retired prior to the issuance of the solicitation. Assuming for the sake of argument, that the facts as contended by Bruno were correct in this regard, a contracting personnel's erroneous advice that a bidder or offeror would receive the award cannot estop the Government from properly awarding the contract to another offeror. See A. D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194.

In view of the foregoing, the protest of Bruno is denied.

*R. F. K...*  
Deputy Comptroller General  
of the United States