A. Zuckerman FL II

DECISION

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

8125

FILE: B-192368 DATE: October 25, 1978

MATTER OF: Engineering Research, Inc.

DIGEST:

1. Allegation that time period allowed for amending proposal was too short is untimely and not for consideration as it was raised after the closing date set for receipt of amended proposals.

2. Where offerors have been afforded opportunity to amend proposals to provide information and clarification of specific portions of their respective proposals, discussions have been conducted within meaning of Defense Acquisition Regulation/Armed Services Procurement Regulation 3-805.1, and where offeror is subsequently excluded from competitive range after its amended proposal is found unacceptable, no further discussions with that firm are required.

3. Commerce Business Daily "sources sought" notice which stated only "qualified" sources could participate in procurement does not provide basis for offeror to believe that its receipt of solicitation qualified firm to receive award in absence of finding of technical acceptability of proposal.

4. Where small business offeror is excluded from competitive range on basis of proposal evaluation, agency is not required to refer matter to Small Business Administration under Certificate of Competency procedure since question of offeror's responsibility was not involved.

Engineering Research, Inc. (ERI), protests the award of a contract to TRW, Inc. (TRW), under Request for Proposals (RFP) N00019-78-R-0016 issued by the Naval Air Systems Command. The procurement is for a quantity of loaded (with explosives) missile warheads. The RFP advised offerors that it was the Navy's intent to award two contracts for its requirement, although the Navy reserved the right to award one contract "to the low responsible offeror, price and other factors considered." ERI does not take issue with the award to Marquardt Company (Marquardt).

ERI's proposal as supplemented was rejected by the Navy after it was judged to be unacceptable. We have been advised that a contract has been awarded to TRW, pursuant to Armed Services Procurement Regulation/ Defense Acquisition Regulation (ASPR/DAR) 2-407.8 (b)(3)(i) (1976 ed.) which permits award of a contract notwithstanding the protest, upon a finding that "the items to be procured are urgently required." The Navy reports that this finding was made at a level above the contracting officer as required by the regulation.

Prior to the issuance of the RFP, the Navy published a "sources sought" notice in the "Commerce Business Daily" (CBD). ERI claims the CBD notice stated that only fully qualified firms (as determined from responses to the notice) could receive the subsequent procurement solicitation.

As its basis for protest, ERI asserts that:

1. The "extremely short response time (10 days) it was afforded * * * to respond to asserted proposal deficiencies was materially prejudicial and hence improper," and that if the Navy had any real concern with deficiencies remaining in its amended proposal "these concerns could be resolved through further negotiations" and oral discussions, which it claims never were held.

2. The Navy's rejection of its proposal cannot be supported because it is a current producer of unloaded warheads and must have been considered "fully qualified" because it received a copy of the RFP in response to the CBD sources sought notice.

3. ERI (as a small business) is entitled to a determination by the Small Business Administration (SBA) under the Certificate of Competency procedures "before it can be removed from the competition."

At the outset, we must consider the Navy's assertion that the protest is untimely because it failed to provide sufficient detail of the grounds for protest. Although the details of the protest were not filed until after the expiration of the time periods set forth in our Bid Protest Procedures, 4 C.F.R. Part 20 (1978), they were filed in accordance with a time extension granted by this Office. We therefore consider the protest as timely.

ERI's claim of impropriety in the 10 day "response" time it was allowed for amending its proposal in response to noted deficiencies will not be considered in any event since it is clearly untimely, as it was raised after the closing date set for the receipt of the amended proposals. 4 C.F.R. 20.2(b)(1) (1978); see, e.g., Unicare, Inc., B-181982, September 4, 1974, 74-2 CPD 146; Bunker Ramo Corporation, 56 Comp. Gen. 712 (1977), 77-J CPD 427.

With regard to ERI's contentions that its proposal deficiencies could have been resolved through "further negotiations" including oral discussions, the Navy reports that after initial proposal evaluation, both the proposals of ERI and TRW were judged to be inadequate, while Marquardt's was considered satisfactory. Because Marquardt was the highest priced offeror, and so as to maximize competition and avoid a "competitive range of one situation," the Navy wrote to TRW and ERI requesting that they provide further information

and clarification of specific portions of their respective proposals. Marquardt was also given the opportunity to amend its proposal. The Navy claims that TRW's amended proposal was "markedly improved" and was thus judged to be acceptable, while ERI's proposal was still found to be unacceptable. ERI was thereafter excluded from the competitive range and no further discussions were conducted with that firm.

DAR/ASPR 3-805.1 (1976 ed.) requires that written or oral discussions be conducted with all responsible offerors who submit proposals within a competitive range. The nature and scope of those discussions is a matter of contracting officer discretion. Food Science Associates, Inc., B-183054, April 30, 1975, 75-1 CPD 269; 50 Comp. Gen. 114 (1970). As a minimum, however, an offeror in the competitive range must be afforded an opportunity to revise its proposal. See, e.g., 51 Comp. Gen. 479 (1972). In this case, all offerors had the opportunity to supplement their proposals as a result of the Navy's written request, and thus "discussions" were conducted. Once ERI was excluded from the competitive range after its amended proposal was found to be unacceptable, no further discussions with ERI were required. Systems Consultants, Inc., B-187745, August 29, 1977, 77-2 CPD 153.

With respect to ERI's assertion that the rejection of its proposal was somehow improper because it was invited to participate in the competition in which only "qualified" sources could participate, we need only observe that a general determination to invite a firm to submit a competitive technical proposal because of that firm's apparent qualification to perform the proposed contract is not a substitute for an evaluation of the proposal under the evaluation criteria of the solicitation. To hold otherwise would negate any necessity for submission of a technical proposal. Moreover, as the Navy correctly points out, even if ERI entertained any contrary understanding, the language of the solicitation, i.e., the solicitation's clearly stated requirement for

a technical proposal and the notice that the failure to submit all required technical information "may result in a finding of unacceptability," should have clearly disabused it of that notion. In addition, we think ERI's participation in the procurement, its proposal submission and its attempt in its amended proposal to address the initial technical deficiencies, bely any argument it now advances concerning a prejudgment of its qualifications. Indeed, had the Navy denied a firm the opportunity to submit a proposal on the basis of the limitation included in the CBD "sources sought" notice, that firm may have had a legitmate basis for protest under our holdings on agency attempts to "prequalify" bidders. See, e.g., Southwest Forms Management Services, 56 Comp. Gen. 953 (1977), 77-2 CPD 183.

Finally, ERI's contentions that it is entitled to a ruling by the SBA through the Certificate of Competency procedure prior to its removal from the competition would be well taken if ERI's responsibility were in issue. However, ERI was not "removed" from the competition because of a determination of nonresponsibility, but rather on the basis of its proposal, i.e., it was excluded from the competitive range after evaluation of the amended proposal, and at no time was the question of ERI's responsibility in issue. Under these circumstances, there is no requirement that the Navy refer the matter to the SBA for consideration. 52 Comp. Gen. 388 (1973); Datametrics, B-184732, July 29, 1976, 76-2 CPD 93; DOT Systems, Inc., B-185558, August 26, 1976, 76-2 CPD 186.

The protest is denied.

R.F. Keller

Deputy Comptroller General
of the United States