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DECISION



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

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FILE: B-193546

DATE: March 22, 1979

MATTER OF: American Nucleonics Corporation

DIGEST:

1. Allegation that technical discussions were held with other offerors in competitive range, but not with protester, is speculative, since protester has offered no evidence and there is no evidence in record supporting allegation.
2. Protester argues that it was led to believe that only price revisions could be submitted in best and final offer. However, it is axiomatic that price and technical changes may be proposed in best and final offer and agency's request for best and final did not state or imply otherwise.
3. Decision not to conduct technical discussions with any offerors was not unreasonable, since contract is for research and development, unique and innovative approach is essence of procurement, and discussion would be likely to lead to "technical transfusion" and "technical leveling."

American Nucleonics Corporation (ANC) has protested the proposed cost-plus-fixed-fee award of a research and development (R&D) contract for an engineering study and development of an experimental model ultra high frequency interference cancellation system under request for proposals (RFP) No. F30602-78-R-0302 issued by the Rome Air Development Center, Griffiss Air Force Base, New York.

Four proposals were received and evaluated. Three, including ANC's, were determined to be technically acceptable and within a competitive range. The contracting officer determined that technical discussions should not be held, since there would be a likelihood that "technical

leveling" and "technical transfusion" would occur. Telephonic negotiations concerning cost and fees were conducted with the three offerors in the competitive range. Then the best and final offers were requested and received. Award is proposed to an offeror other than ANC that, according to the Air Force, has offered a better proposal at a lower price.

ANC alleges that technical discussions were held with other offerors, but not with it, and that as a result of those discussions other offerors revised their technical proposals in their best and final offers. ANC asserts that it was led to believe that only price/cost revisions could be proposed in its best and final offer. ANC also argues that, if technical discussions were not held, all proposals in the competitive range must have been essentially equal technically and award should have been made on the basis of lowest price. ANC asserts that its price must have been lowest, since it did not propose a fee.

The Department of the Air Force (Air Force), in its report, has denied that technical discussions were held with any offeror. The Air Force also states that it is axiomatic that offerors may modify their technical proposals in their best and final offers without prompting from the Government and that ANC should have known this. The Air Force notes, however, that none of the offerors proposed technical changes.

ANC's allegation that technical discussions were held with other offerors is speculative and ANC has presented no evidence in support of the allegation. In our examination of the record, we have found no evidence of technical discussions. We agree with the Air Force's position that ANC should have known that technical changes could have been proposed in its best and final offer. That is a basic tenet of negotiated procurements and the Air Force's request for best and final offers did not state or indicate that proposed technical changes could not be submitted. In any event, the proposed awardee did not propose technical changes in its best and final offer. Thus, ANC was not prejudiced even if it was reasonable for ANC to believe that it could not propose technical changes.

Even though ANC has not specifically argued it, there is the issue of whether the Air Force should have conducted technical discussions with all offerors. The Air Force has justified the failure to conduct technical discussions on two bases. First, the Air Force states that none of the technical proposals of offerors in the competitive range contained any deficiencies, although some contained "weaknesses." Second, the Air Force asserts that, since this was an R&D contract and offerors' innovative and unique solutions were the most important aspect of the technical evaluation, technical discussions would have led to "technical transfusions" and "technical leveling."

The requirement that written or oral discussion be held with all offerors within a competitive range is found in 10 U.S.C. § 2304(g) (1976). It is our view that such negotiations should be conducted under competitive procedures to the extent practical and that they be meaningful in order that competition is maximized. However, the content and extent of discussions needed to satisfy the requirement of 10 U.S.C. § 2304(g) is a matter of judgment primarily for determination by the procuring agency and that determination is not subject to question by our Office unless clearly arbitrary or without a reasonable basis, provided, of course, that the discussions held do not operate to the bias or prejudice of any competitor. 51 Comp. Gen. 621 (1972). See also B-172946(1), December 23, 1971.

In 51 Comp. Gen. 621 (1972), we recognized that the statute should not be interpreted in a manner which discriminates against or gives preferential treatment to a competitor and that the disclosure to other offerors of one offeror's innovative solution to a problem is unfair. Thus, where there is an R&D procurement and the offeror's independent approach to solving a problem is the essence of the procurement, technical negotiations must be curtailed to the extent necessary to avoid technical "transfusion." 52 Comp. Gen. 870 (1973). In the circumstances of the present case, we do not think that the Air Force's decision not to conduct technical discussions was unreasonable.

Regarding ANC's argument that all technical proposals must have been essentially equal and award should have been made on the basis of lowest price, we have

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examined the record and the proposed awardee has both the highest rated technical proposal and the lowest price.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States