

DECISION



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

12546

PL-11

[Protest Alleging Improper Procedures by Navy]

FILE: B-194570

DATE: January 15, 1980

MATTER OF: Introl Corporation

DIGEST:

1. Request for second round of best and final offers is not objectionable where valid reason exists for such action.
2. Where only evidence disputing contracting agency's position that protester was not informed during negotiations of competitor's low price is protester's contradictory statement, protester has failed to carry burden of affirmatively proving its assertion.
3. Agency's acceptance of proposal offering delivery date of "approx. 150 days" was not improper where circumstances reasonably supported agency's interpretation of proposal as offering to meet solicitation's required delivery date of 150 days.
4. Government may consider late modification reducing price received from otherwise acceptable low offeror.

DLB 15-49

DLB 509

DLB 03634

Introl Corporation (Introl) protests the award of a contract for two diesel generator sets to ILI Corporation (ILI), under request for proposals (RFP) No. N00406-79-R-0245, issued by the Naval Supply Center, Puget Sound, Washington. Introl asserts that the Navy improperly requested a second round of best and final offers, that the Navy conducted an auction, that ILI was permitted to offer a delivery schedule different from that specified in the RFP, and that the Navy improperly accepted ILI's best and final offer which was not received on time.

*Contract award protests
solicitation specifications*

*0083H
111299*

The RFP was issued on December 13, 1978, with a closing date, as amended, of February 6, 1979. Best and final offers were initially received on February 23, 1979, with the following result:

| | |
|------------------------|-----------|
| ILI Corporation | \$65,892 |
| Emerson GM Diesel | \$77,000 |
| Mentzer Detroit Diesel | \$83,743 |
| Introl Corporation | \$89,280 |
| Northern Diesel | \$123,548 |

The RFP's specifications required that the engines of the generator sets meet certain minimum horsepower levels. Subsequent to the receipt of best and final offers, the agency's technical personnel advised the contracting officer that it would be in the best interests of the Government to request specifications, standards, and descriptions of all engines to be furnished by each offeror. (The Navy was primarily concerned about the ability of ILI to meet the engine specifications of the RFP, apparently because of ILI's low price.) Descriptive literature was therefore requested from all offerors in March, 1979. After review of the technical literature submitted, the Navy determined ILI was offering an engine with less horsepower than specified. Upon being so informed, ILI corrected this deficiency in its proposal. All other offerors' literature indicated compliance with the engine specifications.

A second round of best and final offers was requested and subsequently received on April 3, 1979. There was no change in the relative standing of offerors, with ILI still significantly the low offeror. Consequently, on April 5, 1979, the contract was awarded to ILI as the low, responsible offeror.

Introl's first contention is that the Navy improperly requested a second round of best and final offers to allow a "lower price proposal with non-conforming machinery to re-propose machinery with an adjusted price". As stated previously, the Navy states that it determined that it would be in the best interests of the Government to request technical literature from all offerors concerning the technical compatibility of the engines to be provided with the generator sets.

Generally, our Office has held that, after negotiations and best and final offers, negotiations should not be reopened unless it is clearly in the best interest of the Government, ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301. However, we have upheld agency determinations to request a second round of best and final offers when a valid reason exists for such action. Sycor, Inc., B-185566, April 27, 1976, 76-1 CPD 284. While it would have been preferable for the Navy to ascertain from offerors prior to the initial receipt of best and final offers the conformity of engines to specifications, Introl has not shown that the decision to reopen negotiations was arbitrary or without a reasonable basis. The record establishes that the contracting officer, upon the advice of the agency's technical experts, decided to request further technical clarification from all offerors concerning their proposals. We view this action as a permissible exercise of discretion by the contracting officer.

Introl next contends that it was improperly informed by the Navy prior to the receipt of second best and final offers of ILI's low offer of approximately \$66,000 and that this constituted an auction. The Navy flatly denies this allegation. Since the only evidence as to whether Introl was so advised is the conflicting statements from Introl and the Navy, we cannot say that Introl has met its burden of affirmatively proving its assertion. Telectro-Mek, Inc., B-185892, July 26, 1976, 76-2 CPD 81.

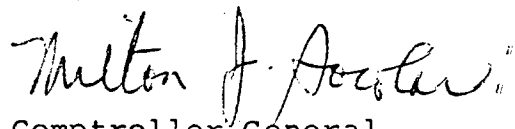
Introl next argues the Navy permitted ILI to offer a different delivery schedule than that specified in the RFP. On March 28, 1979, the Navy, in a TWX, requested second best and final offers and specified "150 day delivery" for the items. ILI, along with its price quotation, offered "delivery approx. 150 days". Since previous offers from ILI during negotiations indicated an offered delivery date of 120 to 150 days, the Navy did not consider this variation to be of any significance and awarded the contract to ILI apparently believing that ILI's offers indicated a delivery of not more than the 150 days required. We believe the better approach would have been for the Navy to seek clarification from ILI, holding another round of discussions if necessary. However, in light of the negotiation history of the procurement, we cannot say that the Navy's interpretation of ILI's proposal as offering to meet the required delivery date was unreasonable.

Finally, Introl argues that the Navy improperly accepted ILI's proposal of April 3, which it claims was late by approximately one hour and twenty minutes. The solicitation provided in § Clb that:

"* * * 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."

We think the language of § Clb clearly allowed the Government here to accept more favorable terms from an otherwise acceptable offeror and that other offerors may not complain because their relative standing is not affected. On March 28, 1979, several days before the time specified for receipt of best and final offers, ILI sent and the Navy received what it considered a "successful proposal from ILI". ILI's late April 3 modification simply further reduced its low price.

The protest is denied.



For the Comptroller General
of the United States