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DECISION



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

FILE: B-204604

DATE: December 31, 1981

MATTER OF: Real Fresh, Inc.

DIGEST:

1. Price reduction submitted in response to the contracting agency's written advice that the solicitation "exists in a competitive environment" properly was rejected as late, since such advice was given orally prior to request for best and final offers, best and final offers already had been submitted, and the agency's advice cannot reasonably be viewed as a reopening of negotiations.
2. The decision not to reopen negotiations after the receipt of a price reduction after best and final offers were received was not an abuse of the contracting officer's discretion where the bases for the decision were that both firms had been given a fair chance to submit their best offers, the preaward survey already had been concluded, and the award price was considered reasonable.
3. Where a firm is not prejudiced by an agency's failure to notify it promptly that its proposal modification will not be considered because it was received late, the failure is a procedural deficiency that does not affect the validity of the contract award.
4. Award can be made to a firm whose offer was on an all-or-none basis where the solicitation did not preclude all-or-none proposals and the firm's price, the determinative award factor, was the lowest one received.
5. There is no legal basis for an agency to give special consideration to a small business in an unrestricted procurement.

6. GAO does not consider protests against affirmative responsibility determinations except in limited circumstances.
7. Protest that the rejection of the protester's proposal modification as late is merely an element in a pattern of bias against the firm characterized by earlier agency procurement actions adverse to the protester, is denied, where the agency has advanced reasonable justification for each of those actions and the modification in any case properly was rejected.

Real Fresh, Inc. protests the Defense Logistics Agency's (DLA) award of a contract to Kern Foods, Inc. under request for proposals DLA 13H-81-R-8848 to supply 20,401,632 bags of cheese spread. The cheese spread is a component of a complete ration package prepared under the Government's "Meal-Ready-To-Eat" (MRE) program which involves replacing canned foods with food packaged in polyethylene-lined flexible pouches. Components are supplied as Government-furnished material to an assembly contractor that combines various components into a complete meal.

The thrust of the protest is that DLA improperly rejected as late a price revision to Real Fresh's best and final offer that would have caused Real Fresh to be the low offeror. (Price was the determinative award factor.) Real Fresh also suggests that the awardee will not be able to meet the contract's requirements, and that the history of the MRE program procurements evidences a pattern of bias against Real Fresh.

We deny the protest in part and dismiss it in part.

FACTS

Initial proposals were received on July 16, 1981, with the only offerors being Real Fresh and Kern Foods. Discussions were held on July 28 and 29, and by telex of July 29 DLA requested that best and final offers be submitted by 3 p.m. on July 31. In this respect, the record shows that MRE item procurements generally allow only a short period between the close of negotiations and best and final offer submission.

Also on July 29, a procurement agent telephoned Real Fresh and Kern Foods to advise that the solicitation existed in a "competitive environment" and that a letter would be sent confirming that fact. DLA asserts that the reason for giving this advice was that the contracting officer was concerned that Real Fresh, which was the sole-source in the previous cheese spread purchase, incorrectly might be pricing its offer on the assumption that this contract also was going to be a sole-source one. A letter signed by the contracting officer was sent to each offeror on July 30 stating:

"Confirming your conversation, 29 July 1981, with * * * [the procurement agent], Solicitation DLA13H-81-R-8848 for MRE Cheese Spread exists in a competitive environment."

Real Fresh received the contracting officer's letter on August 6. Real Fresh already had responded to the July 29 telex request for best and final offers in a July 30 telex. Real Fresh nonetheless also responded to DLA's July 29 letter in an August 6 telex that purported to amend its best and final offer "as a consequence of information contained" in the contracting officer's letter. The contracting officer received the telex on August 10, which reduced Real Fresh's best and final offer from \$5,086,560.74 to \$4,952,522.02. Kern Foods' best and final offer was \$5,026,522.30.

The contracting officer rejected Real Fresh's attempted price reduction as a late revision to the firm's otherwise timely, and unsuccessful, best and final offer, since it was received after the date set for best and final offer submission.

PROTEST

The rejection of Real Fresh's submission

(a) Real Fresh states that it understood the contracting officer's July 30 letter confirming the previous day's telephone conversation to be a request for a new best and final offer, and thus that Real Fresh's response was timely. In this respect, Real Fresh asserts that previous MRE procurements often involved the reopening of negotiations after best and final offers, and a new round of offers.

We do not believe that the contracting officer's July 30 letter confirming the telephone conversation of

The previous day can reasonably be read as soliciting a second round of best and final offers. In contrast to the actual July 29 telex requesting best and final offers which expressly identified itself as such a request, the July 30 letter, quoted above, provided no express basis for the recipient to view it as Real Fresh allegedly did. It only stated that the procurement "exists in a competitive environment." It did not mention a new best and final offer, and did not set any required receipt date. We simply do not see how the letter reasonably could be viewed as a reopening of negotiations and a request for another offer. In any case, Real Fresh received the same information in the July 29 telephone call from DLA as it did in the July 30 confirming letter. We do not see why, if the firm believed that the advice in issue necessitated a lower offer than otherwise intended, it would not have incorporated a response to that advice in its July 30 best and final offer.

We therefore agree with DLA that Real Fresh's August submission was a late proposal revision.

A late proposal or a late modification to a best and final offer can be considered only in the exact circumstances provided for in the solicitation. See Jerry Warner and Associates, 57 Comp. Gen. 708 (1978), 78-2 CPD 146. DLA's solicitation incorporated by reference the late proposal clause at Defense Acquisition Regulation (DAR) § 7-2002.4 (1976 ed.). The clause precludes the consideration of late modifications to best and final offers except in circumstances that do not apply here.

(b) Real Fresh suggests that, in any case, it was incumbent on DLA to reopen the negotiations upon receiving the firm's price revision showing that the Government would save money if Real Fresh, instead of Kern Foods, were awarded the contract.

We have held that the decision whether to reopen negotiations after receipt of a late price reduction from an otherwise unsuccessful offeror is within the contracting officer's discretion, and essentially should be based on whether the late modification fairly indicates that negotiations would prove to be highly advantageous to the Government. Timex Corporation, B-197835, October 10, 1980, 80-2 CPD 266. The reason for this standard, as well as for the late proposal rule itself, is that the manner in which the Government conducts its procurements must be subject to clearly defined

standards that apply equally to all so that fair and impartial treatment is ensured. There must be a time after which offers generally may not be received. To permit one offeror to deliver its proposal or modification after the closing date inevitably would lead to confusion and unequal treatment of offerors, and thereby would tend to subvert the competitive system. While we realize that by application of its late proposal rules the Government at times may lose the benefit of proposals that offer terms more advantageous than those received timely, maintenance of confidence in the competitive system is of greater importance than the possible advantage to be gained by considering a late proposal or modification in a single procurement. See Data Pathing Inc., B-188234, May 5, 1977, 77-1 CPD 311.

Here, the contracting officer decided not to reopen the competition upon receipt of Real Fresh's attempted price reduction for a number of reasons. The competition had ended, and both firms involved had been given fair and equal chances to furnish their best proposals. A preaward survey team already had visited Kern Foods' facilities, had orally reported that its finding was favorable, and was in the process of preparing a written report. Finally, the contracting officer considered Kern Foods' price to be reasonable. The contracting officer therefore concluded that reopening negotiations essentially to auction the requirement because Real Fresh offered to save the Government approximately 1.5 percent from what it was going to pay Kern Foods would not be in the interest of the integrity of the competitive procurement process as reflected in the late proposal rule. We see no reason to disagree with that conclusion.

(c) Real Fresh complains that even though DLA evidently decided not to consider the firm's August 6 price reduction when it was received, on August 14 and again on August 19 DLA did ask Real Fresh to extend its offer.

The agency report does not specifically address this issue. Nonetheless, the record indicates that it was not until August 18 before it was finally concluded in a determination and finding signed by the contracting officer that the Real Fresh price reduction was late and would not be considered. In any event, we do not see how Real Fresh was prejudiced by extending its offer for a short period of time.

(d) Real Fresh complains that it did not receive preaward notice that its price reduction had been rejected as late.

While DAR § 3-506(c) provides for prompt notice to an offeror that its late proposal or modification will not be considered for award, the regulation also states that post-award notice is acceptable when the proposed contract is to be awarded within a few days. DLA advises that it did not immediately notify Real Fresh that the firm's August 6 communication could not be considered because it was not received until August 10 and the agency expected to award the contract shortly. (In fact, award was made on August 24.) Also, the formal determination not to consider the offer apparently was not made until August 18, as stated above.

In any event, even if DLA should have notified Real Fresh more promptly than it did, the firm's price reduction properly was rejected, and the firm therefore was not prejudiced by the delay in notification. In such case, failure to receive prompt notice of the rejection of a late offer or modification is a procedural deficiency that does not affect the validity of the award. See Systems Science and Software, B-182693, June 6, 1975, 75-1 CPD 343.

(e) The protester suggests that the award of the entire requirement to Kern Foods, which submitted an all-or-none offer, was inconsistent with what Real Fresh understood to be DLA's desire for two cheese spread suppliers, and failed to give adequate consideration to the fact that Real Fresh is a small business firm.

We find nothing in DLA's solicitation, however, to preclude an all-or-none proposal. Further, since the procurement was open to both large and small businesses, it would have been improper for DLA to give any special consideration to Real Fresh's small business status. See Umpqua Research Company, B-199014, April 3, 1981, 81-1 CPD 254.

Kern Foods' Capability

Real Fresh protests that Kern Foods will not be able to meet the contract's requirements.

A firm's ability in that respect is a matter of responsibility. DLA has determined that Kern Foods is a responsible concern. Our Office does not review a protest

against an affirmative determination of responsibility absent a showing that contracting officials acted fraudulently or in bad faith, or that the solicitation contained definite responsibility criteria which were misapplied, Condor Industries, Inc. B-203545, October 21, 1981, 81-2 CPD 326. Since neither exception applies here, the protest on this issue is dismissed.

Alleged pattern of bias against Real Fresh

Real Fresh states that a number of earlier solicitations under the MRE program under which Real Fresh expected the contract awards were canceled and the requirements resolicited. Real Fresh contends that the cancellations evidence a pattern of bias against Real Fresh, and that the rejection of its price reduction in this procurement is simply another element in that pattern. Real Fresh also points out that it has a claim under another MRE-related contract pending with the same contracting activity, which the firm suggests may be another reason that its price reduction was rejected.

DLA's report on Real Fresh's protest includes a detailed reply to the firm's allegation of a pattern of discrimination. The reply explains the reason for each procurement action complained of. For example, DLA asserts that three of the solicitations were canceled because substantial delays were encountered in competing the contracts to assemble the components (e.g., cheese spread, jelly) so that the components would have to be stored for unacceptable lengths of time if their procurements were not canceled before award. Two other solicitations were issued, according to DLA, because the assembly contractor defaulted, subsequently filed for bankruptcy, and the bankruptcy court would not release the Government-furnished components. DLA asserts that the court's action created a potential shortage of specific components and the solicitations were issued to alleviate that problem. When the court reversed itself and released the Government-furnished components, the need for the components solicited no longer existed and the solicitations therefore were canceled. The contracting officer also denies that Real Fresh's pending claim influenced the decision here.

While it is unfortunate that Real Fresh's experience in a number of MRE-related procurements has been unsatisfactory for the firm, there is no basis to conclude that the contracting officer's action here was an example

of improper discrimination against Real Fresh. We therefore find no legal merit to Real Fresh's argument in this respect.

The protest is denied in part and dismissed in part.

Harry R. Can Cleve.
For Comptroller General
of the United States