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DECISION

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

FILE: B-205278

DATE: February 8, 1982

MATTER OF: International Automated Systems, Inc.

DIGEST:

1. Where the only evidence on whether a contract specialist gave the protester oral advice at variance with an express provision of the RFP is conflicting statements by the protester and the contracting officials, the protester has not carried its burden of proof.
2. Protest that the awardee had been preselected to win the competition is denied where the protester has not presented any substantive evidence to support the allegation.

International Automated Systems, Inc. (IAS) protests the award of a contract by the Department of the Army to Battelle Memorial Institute under request for proposals (RFP) No. DAAK10-81-R-0280. The contract is to establish a high speed chromium plating process to coat the surfaces of small caliber gun tubes. IAS protests the fact that the contract was awarded based on initial proposals, and contends that Battelle had an unfair competitive advantage. IAS also speculates that the contract awarded is for a production effort, whereas in IAS's view the RFP solicited offers for a research and development effort.

We deny the protest.

The Army originally intended to award a contract for the requirement to Battelle on a sole-source basis. The competition was initiated only after an affiliate of IAS noticed the Commerce Business Daily synopsis of the proposed award and advised the Army that IAS also could meet the agency's needs.

The RFP was issued on July 28, with proposals due by September 1. IAS asserts that before the date for receipt of proposals it telephoned the contract specialist with questions about the RFP requirements. IAS alleges it also expressed concern that although the RFP provided that

a competitive range would be established and all offerors in the range would be given the chance to correct and revise their offers, paragraph 10(g) of Standard Form (SF) 33A, the Solicitation Instructions and Conditions, reserved to the Government the right to award the contract based on initial proposals. According to IAS, the contract specialist assured the firm that paragraph 10(g) would not apply to this procurement, and thus that as long as IAS submitted an offer by September 1, any deficiencies in the offer could be resolved during negotiations and in a best and final offer.

Only IAS and Battelle submitted proposals. Battelle's offer was judged technically superior to IAS's, which was considered marginally acceptable. Also, Battelle offered to perform at a cost 40 percent less than the cost proposed by IAS. The contract was awarded to Battelle on September 28 based on its initial proposal, pursuant to paragraph 10(g) of SF 33A and Defense Acquisition Regulation (DAR) § 3-805.1(v) (1976 ed). The regulation provides for award without negotiations when it is clear from the existence of adequate competition or from cost experience that acceptance of the most favorable initial proposal will result in a fair and reasonable price, as long as the RFP advised offerors of the possibility of award without discussions.

The contract specialist informed IAS of the award and the contract price on September 29. IAS immediately sent the contract specialist a letter stating that it intended to request a debriefing on the precise reasons why its proposal was not accepted, and complained that it was not afforded the opportunity to improve and revise its proposal through the negotiations process as the contract specialist allegedly had promised the firm. The debriefing was held on October 20. The protest was filed in our Office on October 22.

The Army argues that the protest against the award without discussions is untimely under our Bid Protest Procedures, which require that such a protest be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2)(1981). The Army points out that IAS knew this basis for protest on September 29, when it was advised of the award to Battelle, but the firm did not file the protest with our Office until

October 22. In response, IAS argues that it was entitled to delay protesting until after the October 20 debriefing when it expected to learn the precise reasons for the Army's rejection of its proposal.

We agree with the Army that IAS's basis for protest arose on September 29. The protest is founded on the Army's failure to afford IAS an opportunity to discuss and improve its initial proposal, and not on the specific deficiencies in the offer which the firm may not have been aware of until the October 20 debriefing. (We note in this regard, however, that the firm admits that in fact it knew when submitting its offer that it was deficient in a number of respects, but that it was relying on the negotiations process to resolve these deficiencies.) Accordingly, IAS had to file a protest within 10 working days after September 29. See PSI Associates, Inc., B-200839, May 19, 1981, 81-1 CPD 382.

Nonetheless, our Bid Protest Procedures require only that a protest be filed with either this Office or the contracting activity within the prescribed time. In its September 29 letter to the Army IAS expressly, and strenuously, complained about the agency's failure to enter into negotiations with IAS. We believe that this letter clearly evidenced an intent to protest, and since the Army received it within 10 working days after September 29, the "protest" to the Army was timely. See Abreen Corporation, B-197261, April 18, 1980, 80-1 CPD 274.

Where a timely protest has been filed with the contracting agency, our Office will consider a subsequent protest on the same matter if it is filed within 10 working days after the agency's initial adverse action on the original protest. To the extent that there was any agency action adverse to the position that IAS expressed in its September 29 letter, it occurred at the October 20 debriefing, when the Army apparently reiterated its view that the award to Battelle was proper. Therefore, the October 22 protest to our Office is timely, and we will consider it on the merits.

We deny the protest on this issue, however. While IAS asserts that the contract specialist advised the firm before proposals were due that the Government would not award a contract based on the offerors' initial submissions, both the contract specialist and the contracting officer deny that such a representation was made. The protester

has the burden to prove its case, and when the only evidence on an issue is conflicting statements by the protester and contracting officials, that burden is not met. Harris Corporation, B-200321.2, June 9, 1981, 81-1 CPD 468.

Moreover, while as a general matter negotiated procurements indeed include discussions after initial offers are submitted, and the subsequent opportunity to revise offers as necessary or desired, DAR § 3-805 establishes an exception where offerors are advised of the possibility of award without discussions and the award will be at a fair and reasonable price. This RFP as written clearly reserved to the Government the right to award a contract based on the initial proposals. Also, paragraph 3 of SF 33 cautioned that oral explanations or instructions given before the award of the contract do not bind the Government. We think it unreasonable for IAS to have assumed based on the alleged oral representation by the contract specialist that the Government had predetermined to waive a right expressly set out in the solicitation and the procurement regulations. See Neshaminy Valley Information Processing, Inc., B-194286.2, September 14, 1979, 79-2 CPD 199.

Further, the discussions in a negotiated procurement are held only with firms in the competitive range, that is, that have a reasonable chance for the award. See Foreman Industries Inc., B-193732, June 15, 1979, 79-1 CPD 422. Since even a technically acceptable offer may be excluded from the competitive range if there is no reasonable chance that it will be selected, IAS's marginally acceptable initial proposal, at a cost 40 percent more than Battelle's, may well have been excluded from the competitive range even if negotiations were contemplated. See Media Works, Inc., B-204602.2, January 19, 1982, 82-1 CPD ____.

The protest that Battelle had an unfair advantage in the competition is based on two factors: (1) the RFP included a DD Form 1423, "Contract Data Requirements List," which actually had Battelle's name typed in the space labeled "contractor" and indicated that it had been approved in March of 1981; and (2) the fact that the same contracting officials who initially selected Battelle for a sole-source contract evaluated IAS's competing proposal.

Regarding the first point, the Army states that after deciding to conduct a competition for its requirement, to conserve resources it used documentation from the sole-source

solicitation that initially had been issued to Battelle, and inadvertently failed to delete the firm's name and the approval indication. The protester was aware of the agency's original intent to award a contract to Battelle, and we therefore see no reason to object to the award on this basis.

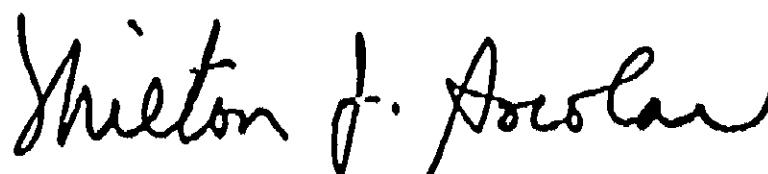
Also, we see nothing wrong in using the same people who may have been involved in the original sole-source decision to evaluate the proposals in the competition. The selection of a technical evaluation panel is within the contracting agency's discretion, and we will not attribute unfair motives to the evaluators based on the mere allegation of bias or preselection, as here, without a showing of actual bias sufficient for their disqualification. Underwater Systems, Inc., B-199593, May 6, 1981, 81-1 CPD 350.

Finally, IAS states that it assumed that the contract effort was to be of a research and development type, and prepared its proposal on that basis, which the firm suggests is the reason for its high cost proposal. IAS complains that the contract awarded, however, actually is a production contract, evidenced by the fact that the contract will be funded by a "production" appropriation.

In response, the Army points out that the RFP clearly stated that the contract's objective is to establish a high speed chromium plating process for small caliber gun tubes, that this is not a research and development effort, and that the proper funds are being used. The Army asserts that both offerors responded to the same solicitation requirements, each offeror was evaluated as to how the firm would meet the requirements, and the award simply was made based on the better proposal.

We do not understand IAS's objection to the award for the reason stated by the firm. No matter how the Army's requirement is formally characterized, the RFP advised all offerors what the contractor would be obligated to do.

The protest is denied.

for 
Comptroller General
of the United States