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DECISION



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

FILE: B-205513

DATE: June 21, 1982

MATTER OF: Auto Paint Specialist, Inc., dba K & K
Truck Painting

DIGEST:

1. Protest that rejection of technical proposal, as unacceptable was improper is denied as record shows that protester failed to meet majority of standards of RFP's evaluation criteria and that rejection of proposal resulted from reasonable judgment of agency's technical experts.
2. Protest that agency's technical experts failed to inform offeror of all deficiencies in its proposal after initial technical evaluation is denied where questions and comments communicated to protester concerning its proposal were not intended to be all-inclusive but rather were part of ongoing process to determine technical acceptability.

Auto Paint Specialist, Inc., dba K & K Truck Painting protests the rejection of its technical proposal as unacceptable under request for proposals (RFP) No. DAHC77-81-R-0083, issued by the Army Support Command, Hawaii. For the reasons discussed below, we deny the protest.

The RFP, issued on March 16, 1981, requested offers to "rust repair and rustproof" approximately 3,800 tactical wheeled vehicles and trailers. The solicitation described the format for the proposals which was to be in two volumes, the technical proposal and the price proposal. The solicitation further provided for fixed-price proposals for the rustproofing work and for time and material unit price proposals for rust repair work. The RFP specified that proposals would be evaluated in two phases. Phase one would consist of the technical evaluation, which would include a review of the offeror's proposed

facilities, organization, proposed technical procedures and past experience. Phase two, evaluation of costs and negotiations, would be limited to those offerors whose technical proposals were determined to be adequate under phase one.

On May 26, four proposals were received and evaluated by the Army's technical evaluation team (TET). None of the proposals was found to be acceptable. The TET found that three proposals failed to offer the required delivery schedule and one proposal (K & K's) failed to detail technically adequate procedures and facilities to properly perform the work. Subsequently, the solicitation was amended to relax the contract performance period in accordance with a recommendation from the TET. Included with the amendment was a list of questions and comments developed by TET which the offerors were instructed to consider when formulating their responses to the amended solicitation.

Before revised proposals were due, K & K called the contracting officer to ask if it could change the location of its proposed facility since it had lost the lease on its proposed facility. The contracting officer said that he had no objection but that the new facility must be adequate.

Four revised proposals were received on September 22 and discussions were conducted with each offeror through October 6. During this period the TET and the contracting officer visited K & K's proposed facility. The other three offerors, unlike K & K, proposed to utilize Government-owned facilities to perform the contract, since the RFP permitted offerors to use either their own facilities or the Government-owned facilities at Schofield Barracks.

At the conclusion of the technical evaluation, the Army determined that three proposals were acceptable and eligible for phase two of the selection process, while K & K was advised, by letter of October 20, that its proposal was technically unacceptable. This letter

from the contracting officer stated that the deficiencies in K & K's proposal were so material that only major revisions or additions could make it acceptable and, in accordance with section 3-508.2(a) of the Defense Acquisition Regulation, no revision to the proposal would therefore be considered. The letter then detailed several examples of deficiencies in K & K's proposal which were found to be unacceptable. A meeting between K & K and the Army was subsequently held on October 28 to discuss the deficiencies listed in the letter. On November 4, 1981, K & K filed a "formal complaint" with the contracting activity and by letter of November 6, K & K filed the protest with our Office.

K & K's protest is grounded on the major allegation that the difficulties the Army had with its proposal were minor and could have been readily resolved and that the proposal did not require a major revision or rewrite. Further, K & K alleges that the Army failed to communicate all deficiencies found in its proposal after initial evaluation; that a site visit by TET to K & K's facilities was inadequately conducted; that the technical evaluation of its proposal by TET was generally not consistent with the solicitation evaluation criteria; and that K & K should have been awarded the contract since its current experience under a contract with another agency provides K & K with unique experience to meet the needs of the Army.

As an initial matter, the Army argues that our Office should not consider K & K's protest because it believes the protest to be untimely. As stated previously, K & K received notification by letter of October 20 that its proposal was technically unacceptable together with examples of the proposal's deficiencies. This letter was received by K & K on October 22. On November 4, K & K hand-delivered a "formal complaint" to the contracting officer. By letter of November 6, received by our Office on November 16, K & K filed its present protest.

Conceding that the November 4 letter would be a timely protest if resolution with the contracting agency

was expected, the Army argues that the November 6 letter indicates that K & K "neither expected nor desired its complaint to be handled by the contracting agency but intended the issues raised to be investigated and decided by the Comptroller General." Further evidence of this intention is contained in K & K's letter of November 20, in which it "demands" that award be withheld until the validity of the protest is "determined by the Comptroller General's Office." As a result, the Army asks us not to consider the November 4, 1981 letter to the agency as a protest since "K & K obviously did not seek contracting agency resolution." Therefore, concludes the Army, since the November 6 protest was not received until November 16, or 16 working days after K & K's receipt of the October 20 letter, its protest is untimely.

Our Office may not disregard the November 4 protest to the agency. Offerors are urged by our Bid Protest Procedures to seek resolution of their protests initially with the contracting agency, but there is no requirement for a protester to wait for the agency to decide the protest before filing a protest with our Office. Simply because K & K transmitted a protest to our Office soon after its initial protest to the agency does not justify disregarding the protest to the agency. Since K & K's protest to the agency on November 4 was timely filed, K & K's protest to our Office, filed by K & K before receipt of notification of any initial adverse agency action, is also timely. We therefore will consider the protest.

Concerning the rejection of K & K's technical proposal, it should be noted initially that it is not the function of our Office to reevaluate technical proposals. Audio Technical Services, Ltd., B-192155, April 2, 1979, 79-1 CPD 223. We will examine the record to determine whether the judgment of the contracting agency had a reasonable basis. Wisner and Becker Contracting Engineers and Synthetic Fuel Corporation of America, A Joint Venture, B-191756, March 6, 1979, 79-1 CPD 148. Of the major deficiencies cited by the TET in its technical evaluation

of K & K's proposal, the following four examples are illustrative:

The Army found that K & K failed to describe adequately the types of equipment to perform rust repairs, sheet metal fabrication and rustproofing application. In the case of rustproofers, for example, K & K stated in its proposal that first-class rustproofers would be selected and that they would be in possession of all necessary tools to do the tasks assigned. The Army and the protester disagree as to whether the offeror should have known that a list of equipment was required to be furnished with the technical proposal. In our opinion, K & K should have known that a list of the type of equipment to be utilized was required to be furnished with the proposal since the RFP specifically stated that the offeror shall acknowledge individual tasks and responsibilities and shall indicate how it intends to satisfy each requirement and the type of equipment to be used for each requirement.

The Army found that K & K failed to demonstrate acceptable fabrication procedures for replacement parts. The Army notes that the evaluation criteria requires a statement of the technical procedures for sheet metal fabrication which K & K did not provide. K & K contends that its proposal did not mention sheet metal fabrication, because there is no such requirement stated in the "scope of work" section of the solicitation, and K & K assumed that the Army would replace uneconomically repairable bodies, hoods and assemblies.

The Army states, in turn, that although the RFP listed Government-furnished assemblies, the contractor must be able to fabricate assemblies which are beyond economical repair and for which there are no purchased part or Government-furnished assemblies available. We note that the RFP indicated that sheet metal fabrication would be required and therefore we think that K & K's proposal was deficient because of the failure to state procedures for sheet metal fabrication.

We also note K & K's related contention that the TET used criteria in evaluating technical proposals that were not "keyed" to the specifications. Specifically, K & K alleged that although Section M ("Evaluation Factors for Award") required a demonstration of fabrication procedures, the "solicitation" did not. As the Army points out, Section M is part of the solicitation and a solicitation, like a contract, must be read as a whole. Any mandatory terms must be complied with regardless of their location within the RFP. Our review of the record confirms that the TET evaluated the proposals in accordance with the specifications and the stated evaluation criteria.

The Army also found that K & K's proposed bays were not sufficient in size and quantity to accommodate vehicles to meet production requirements and to provide satisfactory production flow. The Army, quoting from K & K's proposal, states that the facility, when fully operational, "will be able to produce * * * 7 to 8 vehicles per day or 140 to 160 per month." This is less than the required output of 190 vehicles per month. K & K states that it anticipated modifying its present facilities to handle the planned production schedule. It states that with an appropriate selection of vehicle "mix" (vehicle sizes), rust repair and rustproofing can be economically performed with existing bays, since the "configuration and placement can be manipulated immediately because of the portable nature of the equipment." We note, however, the Army's comment that additional bays would not be possible without further congesting K & K's proposed area of work, thereby hindering the production flow. In any event, K & K was required to demonstrate in its proposal that its proposed work facilities would be adequate. It failed to do so.

Further, the Army determined that the parking areas at K & K's proposed facility were congested and inadequate to accommodate a sufficient number of vehicles to insure a nine vehicle per day production schedule. The Army explains that the only vehicle parking areas identified in K & K's proposal serve as both the receiving area as well as the storage area. This the Army found to be inadequate and unacceptable. K & K argues that it planned to effect modifications to the parking areas and that additional parking was available in back of its facilities. Here again, while K & K states that it planned to make modifications to the parking areas in its new facility, it did not demonstrate in its proposal that sufficient parking would be available.

Thus, although K & K has provided detailed technical arguments in support of its protest, we are unable to conclude on the basis of our examination of the record that the Army's determination that K & K's technical proposal was unacceptable was unreasonable. The proposal was evaluated in accordance with the specifications and the stated evaluation criteria and was found to be technically unacceptable. This evaluation occurred during a period of several weeks and was conducted by an engineering team. K & K's proposal was determined unacceptable in the majority of areas evaluated. While K & K obviously does not agree with the Army's evaluation of its proposal, there is nothing in the record to indicate that the rejection of the K & K proposal was the result of anything other than the reasonable judgment of the Army's technical experts. See Honeywell Inc., B-181170, August 8, 1974, 74-2 CPD 87.

K & K also complains because the Army sent K & K a letter on August 7, 1981, containing a list of questions and comments concerning its technical proposal which K & K assumed encompassed all of the deficiencies found in its proposal. K & K states that at no time was it advised that only part of the difficulties with its proposal was addressed by the August 7 letter.

The Army states that the questions and comments that it listed in the August 7 letter was never intended to be all-inclusive but was part of the ongoing evaluation process to determine which offerors were within the competitive range. The Army notes that negotiation procedures require meaningful discussions only with offerors within the competitive range.

We agree. While a contracting agency is required to hold meaningful discussions with an offeror within the competitive range, this requirement does not apply where the offeror is not yet determined to be within the competitive range. Resdel Engineering Corporation, B-191797, June 29, 1978, 78-1 CPD 465. Once the agency determines that a proposal is technically unacceptable and can only be raised to an acceptable level by a major revision or rewrite, the proposal may be excluded from the competition, thereby obviating the need for any further discussions and a request for a best and final offer. Telex Computer Products, Inc., B-190794, July 31, 1978, 78-2 CPD 78.

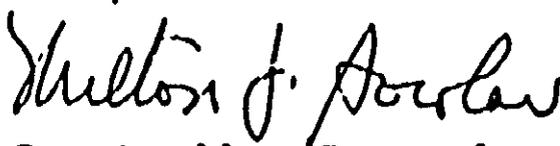
In this case the solicitation stated that negotiations would be limited to those offerors whose technical proposals were determined to be acceptable under phase one. In the initial evaluation, none of the offerors had submitted a technically acceptable proposal. K & K, however, was given a reasonable opportunity to improve its technical proposal during phase one. While the Army did not engage in competitive range negotiations with K & K, as indicated above, it was not required to do so. Moreover, there is no indication that the Army misled K & K into submitting an unacceptable proposal. The August 7 letter referred to "further action" to be taken on K & K's proposal by the TET. With the ongoing evaluations, K & K could not assume that all difficulties and deficiencies in its proposal would

be found by the TET at that point in time, particularly since K & K thereafter proposed a change in its facility. We find no merit to K & K's contention that it had been misled by the Army's August 7 letter.

K & K also alleges that the TET's site visit to its facilities was inadequate since the TET failed to meet with K & K representatives when requested to do so. K & K states that it wanted to review the site survey and to answer any questions that TET members may have had. The Army states that the purpose of the site visit was to evaluate the facilities and not to engage in negotiations with K & K about its facilities. We find no legal basis to question the Army's position in this matter.

Finally, K & K stresses that its experience under a Marine Corps contract makes it uniquely qualified to perform the present contract. However, adequate experience is not sufficient. An offeror in a negotiated procurement must demonstrate within the four corners of its proposal that it is an acceptable contractor capable of performing the work upon terms most advantageous to the Government. Here, K & K was found to have submitted an unacceptable technical proposal. Its prior experience is therefore not material. See Sevrite International, Ltd., B-187197, October 8, 1976, 76-2 CPD 325.

The protest is denied.

for 
Comptroller General
of the United States