

DECISION



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

27500

FILE: B-213382

DATE: February 23, 1984

MATTER OF: Emerson Electric Co.

DIGEST:

1. Questions asked of offerors did not constitute discussions and award on an initial proposal basis was proper where offerors were not allowed an opportunity to revise their proposals and the information requested and provided was not essential for determining the acceptability of proposals.
2. While agency failed to follow solicitation provision which provided that if clarification of offers was needed then best and final offers would be solicited by conducting clarification conversations with both offerors but not asking for best and final offers, protester was not prejudiced as both offerors were treated alike in that neither was permitted to modify its proposal.
3. Under evaluation scheme which states that technical factors are weighted 65 percent and price 35 percent where proposals receive close scores under the technical evaluation, price may be determinative in award notwithstanding that price was less important in overall evaluation scheme.
4. Failure to provide prompt notice of award or to schedule a debriefing are procedural deficiencies which do not affect the validity of an award.

Emerson Electric Co. protests the award of a contract to Exide Corp. under request for proposals (RFP) DACA45-83-R-0020 issued by the U.S. Army Corps of Engineers, Omaha District. Emerson principally complains that it was improperly denied the opportunity to submit a best and final offer. We deny the protest.

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The RFP was the Corps' third attempt to procure an uninterruptible power system for the NORAD Cheyenne Mountain Complex, Colorado Springs, Colorado. The Corps twice issued invitations for bids (IFB) for the system (IFB Nos. DACA45-83-B-0051 and -0085); however, the agency determined that the bids received from Emerson and Exide, under each IFB, were nonresponsive, and canceled both IFBs. Emerson filed a protest with this Office and an action in the United States District Court for the District of Columbia, Emerson Electric Co. v. John O. Marsh, Jr., Secretary of the Army, et al., Civ. No. 83-3027, disputing the agency's rejection of its bid under the second IFB. Emerson also contended that by twice issuing and canceling the solicitations, the agency was, in effect, conducting an auction. We denied that protest, finding that the agency properly determined Emerson's bid to be nonresponsive. We also found that since both bids under the second IFB were nonresponsive, the agency acted properly in canceling that solicitation and that there was no merit to the contention that the agency was conducting an auction. Emerson Electric Co., B-212659, November 4, 1983, 83-2 CPD 529. Emerson subsequently withdrew its court action.

The RFP established an evaluation formula that gave technical factors a weight of 65 percent and price 35 percent and stated, at section M, paragraph 2.3, that once the competitive range was established, "an award may be made to that offeror whose proposal receives the highest point-score." That position further stated that "in the event clarifications are needed, negotiations will be conducted with those falling within the competitive range, after which best and final offers will be solicited from those involved in the negotiations." The RFP also included Standard Form 33A which at paragraph 10(g) advised offerors that award might be made "without discussion" on the basis of initial proposals.

The agency received two offers on the August 30, 1983 closing date, Exide's at \$1,597,000 and Emerson's at \$1,647,000. The Corps evaluated the proposals and determined both acceptable. The agency then contacted both firms, asking Emerson if its equipment would operate under fault conditions and asking Exide if it would furnish cable needed for testing. Both firms answered affirmatively and the award was made to Exide on the basis of its initial proposal.

Emerson contends that the award to Exide based on its initial proposal was improper because the Corps held discussions with the protester¹ and that obligated the agency to request best and final offers and to make award on that basis. The protester further argues that even if the conversation is not considered discussions, it was entitled to submit a best and final offer because the solicitation provided that if the agency needed any "clarification" it would request best and final offers.

Award may be made on the basis of initial proposals, without discussions, where it can be clearly demonstrated from the existence of adequate competition that acceptance of the most favorable initial proposal without discussions would result in a fair and reasonable price, provided that the solicitation advises offerors of the possibility that award might be made without discussions, and provided that award is in fact made without discussions. Telos Computing, Inc., 57 Comp. Gen. 370 (1978), 78-1 CPD 235; GMS Gesellschaft Fuer Metallverarbeitung mbH. & Co., B-197855, January 6, 1981, 81-1 CPD 4; Defense Acquisition Regulation (DAR) § 3-805.1.

Discussions occur if an offeror is afforded an opportunity to revise or modify its proposal or when the information requested and provided is essential for determining the acceptability of the proposal. Clarifications are inquiries to eliminate minor uncertainties or irregularities. Alchemy, Inc., B-207338, June 8, 1983, 83-1 CPD 621. While an agency may request "clarifications" when award is made on the basis of initial proposals, when it conducts "discussions" it must afford all offerors in the competitive range the opportunity to submit revised proposals. See ABT Associates, Inc., B-196365, May 27, 1980, 80-1 CPD 362.

Here, the agency states that it contacted both offerors after it determined their proposals to be technically acceptable and requested that they provide a "simple yes or no response" to the questions asked. This, the agency concludes, did not constitute discussions, but only requests for clarification regarding the already acceptable proposals.

¹The protester does not specifically argue that the conversation held with Exide constituted discussions.

We agree. While the protester argues that the agency asked it technical questions that required answers from its engineer, it does not explain the nature or the extent of its response or why it believes the agency should have viewed its proposal as unacceptable without its response. In fact, no party disputes the Corps' position that the initial proposals were technically acceptable as submitted, and we are not persuaded on this record that the questions asked of the two offerors indicate otherwise. Accordingly, we conclude that the questions asked both offerors and their answers were for clarification purposes only and did not constitute discussions. Consequently, the fact that the questions were asked did not automatically require that each offeror be given an opportunity to submit a revised offer.

Emerson further argues, however, that under section M, paragraph 2.3 of the solicitation all offerors were to be afforded the opportunity to submit best and final offers in the event clarifications were needed.

Paragraph 2.3 does indeed state that negotiations, including the submission of best and final offers, would follow if clarification of offers was needed. Given that competitive range discussions are not legally required when only clarification contacts are made and that the agency did not conduct such discussions here, it seems clear that the language of paragraph 2.3 went beyond what the Corps intended. Nonetheless, if that language established a ground rule for the procurement such that the Corps' failure to adhere to it would prejudice one or more offerors, the Corps could not properly ignore the rule. See, e.g., Union Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134; Homemaker Health Aide Service, B-188914, September 27, 1977, 77-2 CPD 230.

We fail to see, however, how the protester or any other party was prejudiced by what happened here. Unlike the situations in the usual cases, including the cited cases, where requirements, specifications, or evaluation criteria were changed for the benefit of one offeror, in this case the two competitors competed against exactly the same rules and requirements. Both offerors were given

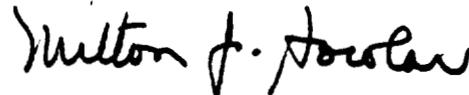
an opportunity to provide simple oral clarification about one aspect of their proposals; neither was permitted to then modify its proposal in any way. As for the protester's contention that it was deprived of its "right" to submit a best and final offer, we simply point out that there is no such "right." The solicitation clearly warned offerors that award could be made on the basis of initial proposals, and just as offerors cannot assume that discussions will be held and best and final offers requested despite such a warning, see Boque Electric Manufacturing Company, B-189118, September 22, 1977, 77-2 CPD 217; Raytheon Company, B-184375, January 28, 1976, 76-1 CPD 55, neither could they assume, pursuant to the language of paragraph 2.3, that an opportunity for discussions and revised proposal submission would be provided in this procurement. Thus, despite the language of paragraph 2.3 regarding clarifications, we perceive absolutely no competitive prejudice to the protester as a result of the Corps' failure to permit submission of best and final offers. We therefore find no basis for sustaining the protest on this basis.

Emerson also contends that the award to Exide was made simply on the basis of low price while the evaluation scheme in the solicitation provided that price would count for only 35 percent of the total evaluation score. We are informed by the agency that it determined that the maximum technical point score that could be achieved was 7,800 and the maximum price score was 4,200. We are further informed that under this formula Emerson received a technical score of 7,054 while Exide's technical score was 7,050. In the price scoring Exide received 3,600 points while Emerson received 3,200 points. Exide received the award because its total score of 10,650 was higher than Emerson's total score of 10,254. This award selection was consistent with the solicitation evaluation scheme which provided that technical factors would be weighted at 65 percent and price at 35 percent and stated that the firm with the highest total point score would receive the award. Since the technical scores were very close, under the evaluation scheme the price scoring properly determined the winner.

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Emerson also complains that the Corps failed to provide it prompt notice of the award and failed to respond to its request for a debriefing. Failure to provide the proper notice is a procedural deficiency which does not affect the validity of an award. Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 172. Similarly, problems regarding the scheduling of a debriefing do not affect the award. In any event, the agency has responded to Emerson's objections to the award in its protest report.

The protest is denied.



Acting Comptroller General
of the United States