DECISION

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

FILE: B-221814.2 DATE: *June 10, 1986*

MATTER OF: Furuno U.S.A., Inc.--Request for Reconsideration

DIGEST:

1. The details of implementing a recommendation for corrective action set forth in a bid protest decision are within the sound discretion and judgment of the contracting agency and, therefore, the agency's ultimate manner of compliance will not be questioned as long as it remedies the procurement impropriety that was the basis for the original decision.

2. Where a recommendation that competitive range negotiations be reopened is sufficient to insure that the protester now receives a full and fair opportunity to compete for the award, the recovery of its costs of filing and pursuing the protest, including attorney's fees, is not appropriate.

Furuno U.S.A., Inc. requests reconsideration of our decision in Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. In that decision, we sustained Furuno's protest against the proposed award of a contract to Raytheon Marine Company under request for proposals No. N00024-85-R-7028(Q), issued by the Department of the Navy for the acquisition of radar units.

Background

The procurement involved a multiphase source selection process, with the Navy first evaluating proposals under the stated criteria of suitability (documentation requirements), technical, and cost, and then subjecting the offered radar units to both land-based and at-sea tests. Furuno's proposal, along with Raytheon Marine's, remained within the competitive range until the last phase of the procurement. Although Furuno's proposal had received relatively strong technical scores and its proposed cost was significantly lower than Raytheon Marine's, the Navy determined that the informational deficiencies in the proposal under the suitability criterion precluded the firm from further award consideration. The Navy then continued final testing of

only the Raytheon Marine equipment. It was not until its debriefing as the unsuccessful offeror that Furuno was informed that its proposal had been evaluated as deficient in the area of suitability.

We found the Navy's action to be legally objectionable because it was inconsistent with the general requirement of the Federal Acquisition Regulation (FAR) that discussions shall be conducted with all responsible offerors whose proposals are within the competitive range. FAR, § 15.610(b) (FAC 84-5, Apr. 1, 1985). Although best and final offers were requested, offerors in fact were given only a limited opportunity to revise their proposals (with respect to cost), and it was clear from our in camera review of the record that the Navy had failed to advise Furuno at the conclusion of the proposal evaluation phase that its proposal was weak under the suitability criterion. In our view, this constituted an improper departure from the requirement to conduct meaningful discussions because the perceived informational deficiencies were a suitable subject for resolution through such discussions, and we saw nothing to indicate that this would have resulted in prohibited technical leveling or technical transfusion. We noted that the very low scores Furuno's proposal received for suitability at an early stage of the procurement continued to have a negative impact on its competitive standing throughout the rest of the selection process. Therefore, we concluded that the Navy's failure to afford the firm the opportunity to correct the informational deficiencies may have precluded it from having its proposal fairly evaluated.

Accordingly, we recommended that the Navy cease further at-sea testing of Raytheon Marine's equipment and reopen competitive range negotiations with both firms at the proposal evaluation phase of the selection process to allow them the opportunity to submit another round of best and final offers.

In its request for reconsideration, Furuno contends that our recommended corrective action is inappropriate because we have not limited the remedy to reopened discussions under the suitability criterion only, the specific evaluation area in which we concluded that there had been a failure to conduct meaningful discussions. In this regard, Furuno contends that its proposal was revealed to Raytheon Marine as part of the bid protest process and, therefore, that Raytheon Marine will gain an unfair advantage if the reopened discussions are extended to include technical and cost considerations as well. Furuno also claims that it is entitled to recover its costs of filing and pursuing the protest, including attorney's fees, on the ground that the Navy's failure to conduct meaningful

discussions unreasonably excluded it from the procurement. We affirm our prior decision and deny the claim for costs.

Analysis

(1) Appropriateness of Remedy

In order to prevail in a request for reconsideration, the requesting party must convincingly show either errors of law or of fact in our prior decision which warrant its reversal or modification. See Department of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13. Furuno's disagreement with our recommendation does not meet that burden here. See Leland and Melvin Hopp, Partners--Reconsideration, B-211128.2, Oct. 16, 1984, 84-2 CPD ¶ 410.

Our Bid Protest Regulations provide that, upon a finding that a solicitation, proposed award, or award does not comply with statute or regulation, this Office shall recommend that the contracting agency implement that remedy we deem appropriate under the circumstances. 4 C.F.R. § 21.6(a) (1985); see also Woodward Assoc., Inc.--Reconsideration, B-218348.2, Apr. 11, 1985, 85-1 CPD ¶ 415. It has been our consistent view that the details of implementing one of our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. Mounts Engineering, et al.--Request for Advance Decision, 64 Comp. Gen. 772 (1985), 85-2 CPD ¶ 181; General Electric Information Services Co., B-190632, Sept. 21, 1979, 79-2 CPD ¶ 209.

Thus, in implementing our recommendation that competitive range negotiations be reopened, we believe that it is within the Navy's discretion to decide the appropriate scope of discussions to be held with the two firms. It is well settled that the context and extent of discussions needed to satisfy the requirement for meaningful discussions are matters primarily for the contracting agency whose judgment will not be disturbed unless it is without a reasonable basis. Trellclean, U.S.A., Inc., B-213227.2, June 25, 1984, 84-1 CPD ¶ 661. In our view, it would not be improper for the Navy, in reopening discussions, to focus upon the suitability matters at issue in our prior decision and to provide Furuno with specific details as to the perceived informational deficiencies in its proposal in this area. Although suitability discussions must also be held with Raytheon Marine as the other competitive range offeror, RCA Service Co., B-219643, Nov. 18, 1985, 85-2 CPD ¶ 563, the same detailed discussions need not be held with the firm as with Furuno since Furuno's informational deficiencies are markedly greater in degree. See Delame Co., B-214082, July 10, 1984, 84-2 CPD ¶ 36.

However, we also recognize that certain factors militate against discussions focused upon the suitability criterion. Reopened discussions will result in the submission of a new round of best and final offers, FAR, § 15.611(c), and nothing prevents either firm from modifying its original proposal in its best and final offer. Moreover, as noted in our decision, it is incumbent upon the Navy, in conducting further discussions, to clarify the true relationship among cost and the other evaluation criteria, since we found that the Navy had utilized a much higher percentage point weight for technical considerations in relation to proposed cost during its evaluation of the proposals than the weight originally assigned in the solicitation.

With these concerns in mind, it is the Navy's responsibility to implement our recommendation consistent with both the government's best interest and the particular facts of the acquisition, and we will not question the agency's ultimate manner of compliance as long as it remedies the procurement impropriety that was the basis for our April 24 decision.

We find no credence in Furuno's allegation that its proposal was revealed to Raytheon Marine during the protest resolution process. Our Regulations provide that copies of agency reports furnished to interested parties shall not include documents that would give the party a competitive advantage. 4 C.F.R. § 21.3(c); see also FAR, § 33.104(a)(5)(i)(B) (FAC 84-9, June 20, 1985). This Office did not furnish a copy of Furuno's proposal to Raytheon Marine and, in the absence of any evidence to the contrary, we must presume that the Navy did not do so either. Furuno's continued allegation[1/] that its price has been revealed remains nothing more than speculation. See Telefax, Inc., B-216596, May 31, 1985, 85-1 CPD ¶ 620. Therefore, since there has been no showing that prices have been exposed, a reopening of discussions will not create an

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1/ In its original protest submission, Furuno alleged that the Navy had revealed its price to Raytheon Marine. However, the Navy responded that it had conducted an investigation into that charge and found that "there was no improper communication of Furuno's price to Raytheon Marine by Navy personnel." Moreover, Raytheon Marine denied ever having received such information from the Navy, commenting that its knowledge that Furuno's price was probably lower than its own was based on a comparison between the Federal Supply Schedule price for a certain Furuno model and its own offered unit.

improper auction situation. FAR, § 15.610(d)(3); see also Woodward Assoc., Inc. et al., B-216714 et al., Mar. 5, 1985, 85-1 CPD ¶ 274.

(2) Claim for Costs

Our Regulations limit the recovery of the costs of filing and pursuing the protest, including attorney's fees, to situations where the protester has been unreasonably excluded from the procurement, except where we recommend that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). The thrust of our Regulations, therefore, is that the recovery of such costs should be allowed only where the protester did not receive a fair opportunity to compete for the award and that, in cases where the protester obtains an award as the result of our recommendations, the award is a sufficient remedy in itself. Bendix Field Engineering Corp., B-219406, Oct. 31, 1985, 85-2 CPD ¶ 496. Here, we were unable to determine that Furuno would have been entitled to the award but for the Navy's failure to conduct meaningful discussions under the suitability criterion, and we believe that our recommendation that discussions be reopened is sufficient to insure that Furuno now receives a full and fair opportunity to compete for the award. Id. Therefore, the recovery of its costs of filing and pursuing the protest, including attorney's fees, is not appropriate.

Our prior decision is affirmed and the claim for costs is denied.

Milton J. Socolar

Acting Comptroller General
of the United States