



The Comptroller General
of the United States

Washington, D.C. 20548

Halperin P&I

Decision

Matter of: Dan-D, Inc. and Fluidaire Equipment Co., Inc.,
a joint venture

File:

B-225404; B-225404.2

Date:

February 17, 1987

DIGEST

1. Value Engineering Change Proposals (VECP's) are made to existing contracts, not as proposals made before a contract is awarded. Therefore, agency properly rejected protesters' VECP included as part of its offer prior to award, because to consider the VECP (which deviated substantially from the solicitation's requirements) the agency would have placed other offerors which properly submitted proposals responsive to the solicitation's requirements, at an unfair competitive disadvantage.

2. Contention that agency's minimum needs can be met at a reduced cost by a sewage system which deviates substantially from the request for proposal's (RFP) specifications, constitutes an allegation that the RFP is unduly restrictive. Because protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to that date, this contention, raised after the award, is untimely.

3. Contracting agency properly may award a contract on the basis of initial proposals, without discussions, where the solicitation advises offerors of that possibility and award will be at the lowest overall cost to the government.

DECISION

Dan-D, Inc., and Fluidaire Equipment Co., Inc. (protesters), a joint venture, protest the award of a contract to Willett Construction Co. (Willett) under request for proposals (RFP) No. DAKF10-86-R-0177, issued by the Department of the Army, for the replacement of a sewage lift station at Hunter Army Airfield, Georgia.

We deny the protests in part and dismiss them in part.

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The RFP, issued on August 5, 1986, stated that award would be made to the responsible offeror submitting the lowest priced offer responsive to the requirements of the RFP. The solicitation also incorporated Federal Acquisition Regulation (FAR) clause, 48 C.F.R. § 52.215-16 (1985), which states that the government may award a contract on the basis of initial offers received, without discussions, and warns offerors that each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

By the closing date for receipt of initial proposals, September 4, 1986, five proposals were received. Willett submitted the lowest price proposal, \$353,475, approximately 2 percent below the government's estimate. The protesters' proposal was the highest of the five, priced at \$445,100. However, with its proposal, the protesters submitted a value engineering change proposal (VECP) which, if accepted, would have reduced its proposal price by over \$200,000. In its VECP, the protesters offered to supply submersible pumps as well as wet well mounted pump stations versus the dry pit sewage pump stations which were required by the solicitation.

The Army determined that it could not accept the protesters' VECP for a number of reasons. First, the Army recognized that VECP's are change proposals made to existing contracts and therefore the protesters' VECP was premature and could not be considered, since it was submitted before a contract was awarded. See Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 52.248-3(b), (c)(1) and (e)(3) (1986); CompuDyne Corp., 44 Comp. Gen. 784 (1965).

The Army also recognized that it could not properly accept the protesters' VECP without giving all other offerors an opportunity to submit alternate proposals allowing submersible pumps/wet well mounted pump stations. However, the Army decided that such action was not necessary because the Director of Engineering and Housing at Hunter Army Airfield had, during the design stages of the project, already analyzed the acceptability of submersible pumps/wet well pump stations and determined that they were unsatisfactory because, among other reasons, they are subject to rapid deterioration of critical parts (e.g., bearings, shafts, seals, etc.) and they are not readily accessible for inspections, maintenance and repair. Award was made to Willett, without discussions with any offeror, on September 29, 1986.

By letter dated October 1, 1986, the protesters submitted to the Army a protest of the award of the contract to Willett.

The protesters complained that award was made on initial proposals without negotiations. In addition, the protesters argued that under the FAR there was no reference as to when VECP's should be submitted and therefore the Army could properly have considered its preaward VECP. Finally, the protesters argued that the system offered in its VECP was technically equal or superior to the system solicited.

On October 20, the protesters filed their protest with our Office, incorporating the allegations and information found in the agency-level protest. By letter dated October 28, the protesters amended their protests to the Army and to our Office to respond to materials received as a result of a Freedom of Information Act (FOIA) request. In their October 28 letter, the protesters emphasize that their VECP was clearly labeled as such, and was not an alternate proposal. Therefore, the protesters argue that not only would it be prejudicial to the protesters, but it would also be illegal for the Army to allow other offerors the opportunity to submit alternate offers based on the changes suggested in the VECP.

The protesters' main contention is that the Army was required to evaluate its VECP and to make award to the protesters based on their lowest priced proposal without giving other offerors a chance to revise their proposals if the system -- offered in the VECP is technically acceptable. We disagree.

As the Army properly determined, VECP's are supposed to be change proposals made to existing contracts, not proposals made before a contract is awarded. CompuDyne Corp., 44 Comp. Gen. 784, supra. Value engineering incentive clauses are placed in contracts to provide authority for permissive approved deviations from specifications, etc., after contract award to an offeror which was otherwise responsive to the requirements of the solicitation. CompuDyne Corp., 44 Comp. Gen. 784, supra. It would be improper to consider a VECP altering the RFP requirements in the evaluation of a response to a request for proposals without giving all competitively qualified offerors a chance to submit proposals which would alter the requirements of an RFP. CompuDyne Corp., 44 Comp. Gen. 784, supra.

The Army considered the desirability of the changes offered in the protesters' VECP. It concluded as it did earlier, that the submersible pumps/wet well system offered in the VECP would not meet its needs. Under the circumstances, we believe that the Army acted properly in rejecting the

protesters' preaward VECP. CompuDyne Corp., 44 Comp. Gen. 784, supra.

The protesters argue that the system offered in its VECP is superior to the system solicited and would create a cost savings to the government. Essentially, the protesters disagree with the Army's determination that the system offered in the protesters' VECP would not meet the Army's minimum needs.

The protesters' arguments concerning the Army's minimum needs constitute an objection to the requirement for dry pit sewage pump stations specified in the RFP. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals be filed prior to that date. 4 C.F.R. § 21.2(a)(1) (1986); Datagate, Inc., B-225377, Nov. 17, 1986, 86-2 C.P.D. ¶ 573. Therefore, the protesters' contention that the pumping system offered in its VECP, (which differs substantially from the solicited system) would meet the Army's minimum needs, is untimely and will not be considered. Datagate, Inc., B-225377, supra.

The protesters' final contention is that since this solicitation was an RFP versus an invitation for bids (IFB), the Army was required to conduct written or oral negotiations with all offerors prior to making the award. The protesters state that despite their repeated attempts to open negotiations "there was no two-way communications."

The Army states that discussions or negotiations were not opened with any of the offerors. The Army also asserts that based on a comparison of the government estimate and other proposals submitted on the specifications contained in the solicitation, the offer submitted by Willett was determined to be fair and reasonable and at the lowest price for the government's minimum needs. The Army states that since the solicitation permitted the award to be made without discussions and none were considered necessary, negotiations were not held.

Under the Competition in Contracting Act of 1984, a contracting agency may make an award on the basis of initial proposals where the solicitation advises offerors of that possibility and the competition or prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government. 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1985). See The Marquardt Co., B-224289, Dec. 9, 1986, 86-2 C.P.D. ¶ 660.

The RFP contained a "Contract Award" clause which specifically advised offerors to submit their best prices and also cautioned that award might be based on initial proposals. In addition, the Army has shown that due to adequate competition, the acceptance of Willett's proposal will result in the lowest overall cost to the government. See Automated Industries, and Associates, Inc., B-225181.2, Dec. 3, 1986, 86-2 C.P.D. ¶ 637. Therefore, we conclude that the Army did not act improperly by making award on the basis of initial proposals.

The protests are denied in part and dismissed in part.

for *Raymond E. Fros*
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General Counsel