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The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of:           Keystone Engineering Company  
File:                 B-228026  
Date:                November 5, 1987

## DIGEST

1. Where the solicitation required a price breakdown from offerors in order to determine whether offers for a base and three option periods were materially unbalanced, the contracting officer's action in permitting one offeror to submit a price breakdown after its submission of a lump sum best and final offer constituted discussions rather than a request for clarification.
2. Where, after the receipt of best and final offers, the contracting officer reopened discussions with one offeror, he was required to reopen discussions with, and request additional best and final offers from, all offerors in the competitive range.
3. Where contracting officer has determined that awardee is responsible, General Accounting Office will not consider protester's assertion that awardee will be unable to perform the contract satisfactorily.
4. Protester's assertion that its price may have been leaked to its competitor is dismissed where protester offers no evidence of a leak other than that the awardee reduced its price in its best and final offer.

## DECISION

Keystone Engineering Company protests the award of a contract to Cubic Corporation under request for proposals (RFP) No. F04606-86-R-1484, issued by the Sacramento Air Logistics Center for the repair and update of 105 roll gimbal units, which are part of the attack radar system of the F-111 aircraft. Keystone contends that the agency improperly permitted Cubic to revise its best and final offer (BAFO) after the closing date. The protester also

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contends that Cubic is incapable of performing and that Keystone's prices were leaked. We sustain the protest in part and dismiss it in part.

The RFP covered a 4-year period (a base year and three option years). Under the solicitation, as amended, 12 units were to be refurbished during the base year; 24 during the second year (option 1); 36 during the third year (option 2); and 33 during the fourth year (option 3). The RFP contained a schedule for the insertion of separate prices for the base year quantity and each of the three option year quantities. The RFP stated that offers would be evaluated by adding the base and option year prices and that award would be made based on the lowest priced acceptable offer.

On the March 13, 1987, closing date, Keystone and Cubic submitted offers in response to the RFP. Keystone's initial offer was low. The agency then conducted discussions with both and requested that BAFOs be submitted by March 27. Keystone's BAFO was low. The contracting officer subsequently determined that the solicitation's statement of work contained errors, and issued an amendment making corrections and requesting a second round of BAFOs to be submitted on June 12. Cubic's second BAFO was lower than Keystone's, but contained only one lump-sum price for the base and option periods. Since prior offers from both firms were submitted in the form of separate prices for the base year and each option year quantity in accordance with the format set forth in the RFP, the contracting officer decided that Cubic's BAFO contained an apparent clerical mistake and contacted Cubic and asked for a price breakdown by base and option years, which Cubic furnished. The contracting officer awarded a contract to Cubic as the firm offering the lowest overall price.

Keystone contends that the contracting officer should have rejected Cubic's second BAFO as unacceptable because it did not conform to the RFP requirement that the base and option year quantities be separately priced. Further, the protester implies that the agency should not have permitted Cubic to amend its second BAFO without at least allowing Keystone an equal opportunity to amend its proposal.

We do not agree that the agency was required to reject Cubic's second BAFO because it failed to price the base and option year quantities separately. Even if, as the protester argues, that rendered Cubic's offer unacceptable, an agency is not required to reject a nonconforming BAFO when it determines it is not in the government's best interest to

do so. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.611(c) (1986); Standard Mfg. Co., 65 Comp. Gen. 451 (1986), 86-1 CPD ¶ 304. In this case, the agency decided that it was preferable to consider Cubic's BAFO rather than to reject it and make award to a higher priced offeror, a decision we think is reasonable.

Nevertheless, we believe that the agency acted improperly by permitting Cubic to amend its offer without allowing Keystone an equal opportunity to do so. When discussions are held with any offeror within the competitive range, discussions must be conducted with all the offerors within the competitive range, 10 U.S.C. § 2305(b)(4)(B) (Supp. III 1985). The agency argues, however, that discussions with Keystone were not required here because allowing Cubic to breakdown its lump sum offer into the required base and option period prices amounted only to a clarification of that offer. The agency points out that it is proper to permit an offeror to clarify an acceptable offer without holding discussions with the other offerors in the competitive range. See Greenleaf Distribution Services, Inc., B-221335, Apr. 30, 1986, 86-1 CPD ¶ 422.

The regulations state that "clarification" means communications with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal and that it may not result in a proposal revision or modification except to the extent the correction of an apparent clerical mistake results in such a revision. FAR, 48 C.F.R. § 15.601. Discussions, on the other hand, occur when an offeror is given the opportunity to revise or modify its proposal (other than as the result of a minor clerical mistake) or when information requested from and provided by an offeror is essential for determining the acceptability of the firm's proposal. Id. We find that by permitting Cubic to amend its proposal by providing a breakdown of its lump-sum price, the agency engaged in discussions with Cubic.

The solicitation, which provided that award would be based on the low acceptable offer calculated by adding prices for the base and option year quantities, incorporated the Evaluation Of Options clause set forth at FAR, 48 C.F.R. § 52.217-5. That clause states that the government may reject an offer if it is materially unbalanced as to the prices offered for the basic and option quantities. The solicitation further provided at clause M-502 that the evaluation would be based on the prices offered for each item. The solicitation schedule listed the basic and option year quantities as separate items.

Thus, we think that a low offer such as Cubic's second BAFO could properly have been rejected by the agency for unbalancing if, for example, it had been "front-loaded" on the base year quantity so that it did not become low until well into the option periods. See Kitco, Inc., B-221386, Apr. 3, 1986, 86-1 CPD ¶ 321. Since Cubic's second BAFO lacked the required price breakdown the agency was not able to determine the relationship of Cubic's prices for the base and option year quantities. We think therefore that this offer as submitted was unacceptable under the terms of the solicitation. Whether or not the submission of a lump sum offer was the result of a mistake, when the agency permitted Cubic to submit additional information concerning its price breakdown which was necessary in order to make the offer acceptable, the agency engaged in discussions with that firm. It was improper for the agency to reopen discussions with Cubic without reopening discussions with Keystone. Greenleaf Distribution Services, Inc., B-221335, *supra*. In this regard, we have recognized that it is not uncommon for offerors to lower their prices in the later stages of negotiation, even where the government's requirements do not change. Bromma, Inc., B-225663, May 6, 1987, 87-1 CPD ¶ 480. We therefore sustain the protest on the issue.

In determining the appropriate remedy where a protester has been denied a fair opportunity to compete, we will consider all of the circumstances surrounding the procurement, including the degree of prejudice to other interested parties or to the integrity of the competitive procurement system and the extent of performance. Bid Protest Regulations, 4 C.F.R. § 21.6(b) (1987); Greenleaf Distribution Services, Inc., B-221335, *supra*. In this case, there is no indication that either Cubic's or Keystone's prices were revealed. Furthermore, it appears that the extent of contract performance is minimal since performance was suspended only 8 days after award. We therefore recommend that negotiations be reopened with both offerors and that an additional round of BAFOs be requested. If circumstances warrant, we recommend that Cubic's contract be terminated for the convenience of the government and that an award be made to Keystone. *Id.* In view of the above, Keystone is not entitled to its costs of pursuing the protest or proposal preparation cost. Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 CPD ¶ 132.

Although we have sustained the protest, since Cubic may retain the award, we will treat the protester's remaining contentions.

Keystone argues that Cubic does not have the capability to perform the contract without its assistance. According to Keystone, Cubic has in the past, always subcontracted with it for the manufacture and refurbishment of the roll bearing, a major component of the roll gimbal unit, and does not have the capability to perform such work in-house. Keystone contends that since Cubic has indicated that it no longer intends to subcontract with the protester, Cubic is incapable of performing the contract.

Keystone is in effect arguing that Cubic is nonresponsible. By awarding to Cubic, the contracting officer indicated that he had found otherwise, however, since before a contracting officer can make an award he must make an affirmative determination of responsibility. FAR, 48 C.F.R. § 9.105-2(a)(1); Universal Shipping Co., Inc., B-223905.2, Apr. 20, 1987, 87-1 CPD ¶ 424. Our Office will not review a contracting officer's affirmative determination of responsibility absent a showing of fraud or bad faith on the part of government officials, neither of which has been alleged here. 4 C.F.R. § 21.3(f)(5); The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6. This ground of protest is dismissed.

Finally, Keystone argues that the fact that Cubic lowered its price significantly between the first and second rounds of BAFOS indicates that it may have received information regarding Keystone's prices. A reduction in an offeror's price in response to a request for a second round of BAFOS does not establish that a competitor's price was revealed. Elekta Instruments, Inc., B-226616, Mar. 30, 1987, 87-1 CPD ¶ 365. Keystone has presented no evidence that its prices were disclosed to Cubic, so the allegation is based on speculation. Since we will not find improper action by an agency based on conjecture or inference, this basis of protest is dismissed. Id.

The protest is sustained in part and dismissed in part.

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of the United States