



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Hartridge Equipment Corporation

File: B-228303

Date: January 15, 1988

DIGEST

Where the procuring agency awarded a contract on the basis of initial proposals, but in light of the offers received it did not appear that acceptance of an initial proposal would result in the lowest overall cost to the government, as required by statute, the agency improperly did not conduct discussions.

DECISION

Hartridge Equipment Corporation protests the award of a contract to Nucleus Corporation under request for proposals (RFP) No. DAAA09-87-R-0673, issued by the U. S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, for the acquisition of 30 Fuel Injection Test Stand (FITS) units.^{1/}

We sustain the protest.

The RFP was issued on April 22, 1987. The RFP allowed offerors to submit unit prices with or without first article approval and cautioned offerors that offers without first article approval that did not contain the information required by Section L-6 (contract numbers and dates of identical or similar items furnished to the government) "may" not be considered for award. The RFP also incorporated by reference the Federal Acquisition Regulation (FAR) clause entitled "Contract Award," found at 48 C.F.R. § 52.215-16 (1986), which informed offerors of the possibility of awarding the contract on the basis of initial proposals without discussion.

^{1/} FITS is used to calibrate fuel pumps of diesel engines in motorized vehicles, such as tanks, halftracks and armored personnel carriers.

The following three offers were received by the closing date of July 17, 1987:

<u>Offeror</u>	<u>W/FA Unit Price</u>	<u>W/Out FA Unit Price</u>
Nucleus Corp.	\$ 60,800	\$ 60,600
Hartridge	No Bid	51,000
Bacharach Inc.	81,532	78,969

Hartridge's total offer was \$1,530,000. The Nucleus offer with first article was \$1,824,000.

The agency's review of proposals showed that Nucleus had submitted the lowest conforming offer with first article approval and Hartridge had submitted the lowest conforming offer without first article approval. The Army decided not to waive the first article requirement; since Hartridge had only submitted an offer for providing the FITS without first article approval, the Army awarded a contract without discussions on September 11, 1987, to Nucleus, the lowest conforming offeror that proposed on a first article approval basis.

After notification, on September 16, 1987, of award to Nucleus at a unit price of \$60,800 with first article approval (Hartridge had offered \$51,000 per unit without first article), Hartridge alleges that it discovered that it had mistakenly inserted its unit price and total amount in line item of the schedule designated as "Without First Article Approval." Instead, Hartridge states that it intended to submit the offer on the line item of the schedule designated as "With First Article Approval." Hartridge contends that this mistake was obvious on the face of its proposal because Hartridge did not supply the information required by the RFP for an offeror to be eligible for waiver of first article approval. Hartridge also argues that the Army should have known from the procurement history of the item that the firm was not eligible for first article waiver. Consequently, Hartridge argues that in accordance with FAR, 48 C.F.R. § 15.607(c), where, as here, award without discussion is contemplated, the contracting officer should have notified Hartridge of the mistake and allowed it an opportunity to verify whether or not it was offering on the basis of first article.

We sustain this protest because we believe discussions should have been held in this case.

Under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1985), 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. Where, however, it appears that acceptance of an initial proposal will not result in the lowest overall cost to the government, the agency is not free to award on an initial proposal basis, but instead must conduct discussions in an attempt to obtain the lowest overall cost or to otherwise determine the proposal most advantageous to the government. See Training and Information Services, Inc., B-225418, Mar. 9, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 266.

Here we think it should have been evident to the Army that the initial proposal it accepted did not necessarily represent the lowest overall cost to the government. Hartridge's initial low conforming offer of \$51,000 without first article approval was \$9,000 less than the next low offer on a with or without first article basis. Two other offerors submitted proposals on both a first article and waiver of first article basis, and those offers indicated that the maximum difference in the cost of the first article was approximately \$2,500, substantially less than the difference between the low offer proposed by Hartridge and the awardee's offer. Furthermore, the solicitation permitted the contractor to furnish either a preproduction model or an initial production item for first article testing. The Army acknowledges that Hartridge is a well-established manufacturer. Since Hartridge committed itself to a production run in its offer, and thus could be expected to be able to readily meet the first article requirement without any major additional effort, Hartridge's price was not likely to increase significantly with the addition of a first article unit. Under these circumstances, we do not believe the Army was in a position to conclude that acceptance of the initial Nucleus proposal would result in the lowest overall cost to the government. Rather, in light of the offers that it did receive and the prices associated with those offers, we think it was incumbent on the Army not to accept Nucleus' initial proposal, but rather to conduct discussions to determine if, as should have seemed likely, a less expensive acceptable offer was available from Hartridge. The Army's failure to do so was, in our view, inconsistent with the requirements of CICA. See JGB Enterprises, Inc., B-225058, Mar. 13, 1987, 87-1 CPD ¶ 283. Accordingly, we sustain the protest on this ground.

The appropriate remedy where an agency improperly fails to conduct discussions would ordinarily be for the agency to do

so and request best and final offers. That remedy is not practical here since Hartridge filed its protest with our Office more than 10 days after contract award, and contract performance was not suspended. See 4 C.F.R. § 21.6(b) (1987); E.H. Pechan & Associates, Inc., B-221058, Mar. 20, 1986, 86-1 CPD ¶ 278. Nucleus has been performing for approximately 4 months.

As no other corrective action is appropriate, we find that the protester is entitled to recover its proposal preparation costs. See Nicolet Biomedical Instruments, 65 Comp. Gen. 145 (1985), 85-2 CPD ¶ 700. We also find Hartridge entitled to recover the costs of filing and pursuing the protest, including any reasonable attorneys' fees, since, given the circumstances of this case, we are not recommending an award to Hartridge. 4 C.F.R. § 21.6(e). Hartridge should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(f).

The protest is sustained.

for 
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of the United States