



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: M. Rosenblatt & Sons
File: B-230026; B-230026.3
Date: April 26, 1988

DIGEST

1. There is nothing wrong with requesting more than one round of best and final offers (BAFO) where a valid reason exists to do so. Changes in contract performance period and other contract terms provide adequate justification for further round of BAFO.
2. Although solicitation provided that technical factors would be weighted more than price, agency may award to lower technical, lower cost offeror instead of higher cost, higher technically scored offeror, where the contracting officer reasonably determines that there is no significant technical difference between proposals and that award to lower cost offeror is most advantageous to government.
3. Protester is not an "interested party" under General Accounting Office Bid Protest Regulations to protest decision to request another round of best and final offers after contract award because, assuming the protest was sustained, the firm would not be in line for award.

DECISION

M. Rosenblatt & Son, Inc. protests the award of a contract to CDI Marine Company (CDIM) under request for proposals (RFP) No. N00406-86-R-0057, issued by the Naval Supply Center, Puget Sound, Washington. The protester alleges that the agency did not follow announced evaluation criteria in selecting CDIM for award and contends that the agency had no legally sufficient bases to request a second and third round of best and final offers (BAFO).

We dismiss the protest in part and deny it in part.

The RFP, issued on June 6, 1986, sought proposals for marine engineering design services at the Puget Sound Naval Shipyard for a period of 1 year plus 2 optional years on a

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cost-plus-fixed-fee basis. The RFP contained Federal Acquisition Regulation (FAR) § 52.215-16 (FAC 84-17), Contract Award, providing for award to the responsible offeror whose offer conforming to the solicitation would be most advantageous to the government, cost and other factors specified in the solicitation considered. The RFP provided that proposals would be evaluated for company experience, management plan, resources and cost, each factor being of equal importance, i.e., worth 25 points on a scale of 100, so that the three technical factors combined counted for three quarters or 75 percent of available points and cost factors counted for one quarter or 25 percent of available points.

Six offerors submitted initial proposals on August 27, 1986. On June 2, 1987, the agency issued a request for BAFOs to be submitted by June 22. On October 21, 1987, the agency issued a second request for BAFOs at the recommendation of its higher Headquarters, asking for offers on the basis of firm-fixed price labor rates; the agency reconsidered however, and canceled the request on November 3, asking offerors instead to extend their proposals until December 16 to allow time for the award approval process.

Two offerors submitted revised cost data in response to the extension request, in the belief that the Truth in Negotiations Act, 10 U.S.C. § 2306a (1987), required updating such data where possible. A third offeror, CDIM, suggested by letter that since nearly 5 months had passed since the original request for BAFOs, a new round of proposals might offer significant savings over the proposals submitted earlier. The contracting officer decided that another round of BAFOs would be in the government's best interest and reopened negotiations on November 19, affording offerors the opportunity to revise their cost proposals based on a revised, 8-month basic contract period and changes in the progress payment terms and cost and pricing data requirements.

Five offerors responded by the closing date of December 3, 1987. Two offerors were determined to be technically unacceptable, and the agency concluded that the remaining three proposals appeared to be substantially equal in the three technical categories, leaving cost as the chief award discriminator. Accordingly, on January 8, 1988, the agency awarded contract No. N00406-88-D-0542 to CDIM, which had submitted the lowest probable cost proposal.

On January 14, 1988, the agency debriefed the protester. On that date, the protester learned that prior to the second round of BAFOs, the contracting officer had tentatively selected the protester for award. Furthermore, it was at

that time that the protester first learned that the submissions of the awardee, CDIM, and Rosenblatt's other competitors had been a factor in the contracting officer's decision to conduct the additional discussions that resulted in the selection of CDIM. In addition, the protester learned that the agency had ultimately made award on the basis of price, which according to the solicitation was worth one-quarter of the total possible points.

On January 15, the protester filed the instant protest claiming the request for a second round of BAFOs constituted an auction and objecting to the agency's emphasis on cost in its award decision. Subsequently, in reviewing the solicitation, the agency found that it had erroneously presumed that the RFP included standard language, "for evaluation purposes, cost will increase in weight as technical proposals become more equivalent." On February 9, the agency, by amendment, requested the three offerors still in the competitive range to submit a third round of BAFOs and added the omitted language to the solicitation. On February 19, the protester filed a second protest against the third round of BAFOs.

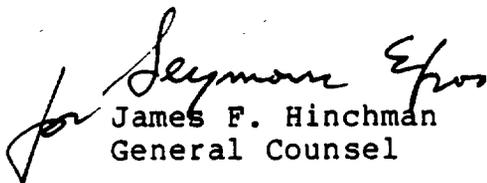
The protester's contention that the request for second BAFOs constituted an impermissible auction is without merit. The mere fact that successive rounds of BAFOs are called does not demonstrate that the procuring agency has conducted an auction. See Research Analysis and Management Corp., B-218567.2, Nov. 5, 1985, 85-1 CPD ¶ 524. Here the Navy requested a second round of BAFOs because the performance period was shortened and a substantial amount of time had passed since the first round of BAFOs. Additionally, progress payment terms were changed as well as cost and pricing data requirements. In short, where as here, a valid reason exists for requesting a second round of BAFOs, there is nothing wrong with requesting a further BAFO. Id.

Even where an RFP, unlike this one, contains a precise evaluation formula and a statement that award will be made to the highest point scored offeror, a contracting officer retains discretion to examine the technical point scores to determine what significance a point differential between offerors represents. Our Office has consistently held that if there is no significant difference in technical merit, then award may be made to the lower cost or priced proposal, even though its total point score may be lower. See Lektron, Inc., B-228600, Jan. 25, 1988, 88-1 CPD ¶ 69; Harrison Systems Ltd., 63 Comp. Gen. 379 (1984) 84-1 CPD ¶ 572.

While we have declined the protester's request to release material related to the agency technical evaluation, we have reviewed this material. At three different times, prior to the first request for BAFOs, after receipt of the first round of BAFOs, and prior to award, the agency compared the technical proposals of the awardee and the protester. In each case, the awardee and the protester were found to be essentially equal technically (CDIM's lower score apparently resulted from minor deficiencies in its performance as the incumbent contractor and ambiguities in the resumes that it submitted). The record indicates that the agency never viewed Rosenblatt's slightly higher point score as evidencing actual technical superiority over the awardee. See, e.g., Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD ¶ 427. This determination is not proven unreasonable by the protester's good faith belief that its proposal should have received a higher rating. Microcom, B-227267, Aug. 7, 1987, 87-2 CPD ¶ 138. In these circumstances, since the record shows that the two offerors were found technically equal, we find no reason to question the agency's determination to make award on the basis of cost.

We dismiss Rosenblatt's protest against the agency's decision to request a third BAFO. The record shows that based on second BAFOs, the protester is not in line for award. To be eligible to pursue a protest, a party must be "interested" within the meaning of our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1988). Where, as here, a protester would not be in line for award even if this Office were to resolve the protest in its favor, the firm generally lacks standing as an interested party to have the matters in issue considered on the merits. Therefore, Rosenblatt is not an interested party to protest the decision to ask for a third round of BAFOs. First Federal Data Services Co., B-224183.2, Feb. 18, 1987, 87-1 CPD ¶ 179.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel