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The Comptroller General of the United States

Washington, D.C. 20548

Decision

Matter of: Panasonic Industrial Company

File: B-232168.2

Date: November 25, 1988

DIGEST

1. A contracting agency may exclude a technically marginal proposal from the competitive range when the offeror's price is substantially higher than the prices of other acceptable offerors and the agency determines that the higher-priced proposal has no reasonable chance of being selected for award.

2. A protest based upon the unsupported allegation that the request for proposals (RFP) in a photocopier services procurement discriminates against offerors that use small, independent dealers rather than a direct sales force to sell and service photocopy equipment is denied where there is no evidence in the record or in the RFP itself of any such bias.

DECISION

Panasonic Industrial Company protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. FCGE-A2-75454-N, issued by the General Services Administration (GSA) to obtain photocopying and related services on a cost-per-copy basis for the Department of the Navy (specifically, the Naval Air Stations at Pensacola and Milton, Florida). A contract was awarded to Pitney Bowes on August 31, 1988. The basic term of the fixed-price contract is 1 year with options for 2 additional years. Panasonic alleges that its proposal was improperly rejected as unacceptable without Panasonic having been given an opportunity to participate in discussions or to cure any deficiencies in its initial proposal. Panasonic also alleges that the RFP discriminates against manufacturers, such as itself, that do not have a direct sales force but rely upon independent, small business dealers to sell and service their photocopiers.

We deny the protest.

The solicitation was issued on July 11, 1988, and six proposals were received by the August 9 closing date. One offer was not considered because it did not include a technical proposal as required by the RFP. The remaining five proposals were evaluated by a source selection evaluation board on five technical factors listed in the RFP. The evaluators rated Panasonic's offer overall as "marginal to unacceptable." One other offer was rejected outright as technically unacceptable.

On August 18, a panel of GSA technical personnel evaluated the technical literature provided by each firm to determine if the proposed equipment met all technical requirements set forth in the RFP. GSA reports that the panel was unable to evaluate Panasonic's offer completely, because Panasonic did not provide sufficient technical information to determine whether the offer met the user's needs as set forth in the statement of work.

The contracting officer decided not to include Panasonic's offer in the competitive range, because it was rated by the technical evaluators as significantly inferior to the other three technically acceptable proposals and Panasonic's price was significantly higher than the prices proposed by the three offerors of technically acceptable proposals. Accordingly, by letter of August 31, Panasonic was notified that its offer was out of the competitive range and would no longer be considered for award. Panasonic then protested to our Office.1/

Panasonic asserts that it was improper for the contracting officer to exclude its offer from the competitive range without holding discussions to give Panasonic a chance to correct or explain any perceived deficiencies in its proposal. We find this argument to be without merit.

The evaluation of proposals and determination of whether an offeror is in the competitive range are matters within the

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1/ Much of the information provided to our Office by GSA in connection with this protest has been denied to Panasonic because, among other reasons, it might give Panasonic a competitive advantage over other offerors or the information was proprietary. Therefore, our discussion is necessarily limited. However, we have examined all of the information, including all evaluation materials, *in camera* in resolving the issues raised by the protester.

discretion of the contracting agency since it is responsible for defining its needs and must bear the burden of any difficulties resulting from a defective evaluation. Kinton, Inc., B-228233 et al., Jan. 28, 1988, 88-1 CPD ¶ 86. An agency properly may determine whether to include a proposal within the competitive range by comparing the initial proposal evaluation scores and the offeror's relative standing among its competitors. Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114. This comparison may take into account any disparity between the prices offered by competitors (Coastal Electronics, Inc., B-227880.4, Feb. 8, 1988, 88-1 CPD ¶ 120), the difference in technical ratings (DAVSAM International, Inc., B-228429.5, Mar. 11, 1988, 88-1 CPD ¶ 252), or a combination of both price and technical factors (Systems Integrated, B-225055, supra). Even a technically acceptable proposal may be excluded from the competitive range when the offeror's price is substantially higher than the prices of other offerors submitting technically acceptable proposals and the agency determines that the higher-priced proposal has no reasonable chance of being selected for award. Pan Am World Services, Inc., B-215308.5, Dec. 10, 1984, 84-2 CPD ¶ 641.

Panasonic has not argued, and the record contains no evidence to suggest, that the evaluators acted unreasonably in rating Panasonic's technical proposal as "marginal to unacceptable" overall on the technical evaluation factors in the RFP. Thus, because of Panasonic's high proposed price and marginal to unacceptable technical rating, we find that the contracting officer properly excluded Panasonic from the competitive range on the basis of a finding that the proposal had no reasonable chance of being selected for award. See Federal Acquisition Regulation (FAR) § 15.609(a); Coastal Electronics, Inc., B-227880.4, supra. As Panasonic's proposal was properly excluded from the competitive range, discussions with Panasonic were not required. FAR § 15.610(b).

Panasonic next argues that the RFP discriminates against offerors that use small, independent dealers to sell and service their machines, because some of the technical information requested is proprietary to the vendors and is, therefore, not available to Panasonic. On a related point, Panasonic complains that it is not clear from the RFP what technical information is required in order to be considered acceptable by GSA.

These allegations concern improprieties that should have been apparent to Panasonic from the solicitation itself; accordingly, these issues are untimely because they were not protested before the closing date for receipt of initial proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988).

In any event, we see no evidence of bias in favor of offerors that employ a direct sales force to sell and service copiers. The RFP clearly set forth in the statement of work, the instructions to offerors, and the evaluation factors sections exactly what was required of all offerors in their proposals and how those proposals would be evaluated. As for the claim that Panasonic cannot get proprietary information from its vendors, we find that the problem, if any, is one that must be resolved between Panasonic and its dealers. In other words, such marketing problems are not created by the terms of the RFP but are related to the particular circumstances existing within Panasonic's own business structure, and therefore are to be resolved by Panasonic and its vendors rather than by the government.

The protest is denied.

Seymour Efros

for James F. Hinchman
General Counsel