The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: International Filter Manufacturing Corporation

File: B-235049

Date: June 21, 1989

DIGEST

1. Offeror who failed to acknowledge a material solicitation amendment was properly considered ineligible for award. Where the contracting agency decided to reopen discussions to give the offeror the opportunity to acknowledge the amendment, the agency properly reopened discussions with all offerors in the competitive range.

2. Protest that agency deliberately and in bad faith failed to send protester a solicitation amendment is denied where the annotated offerors list shows that the agency mailed the amendment to the offeror and the agency subsequently reopened discussions to permit the protester to acknowledge the amendment.

3. Where agency learned that offeror's product will meet its needs but does not comply with requirements of the solicitation, agency properly decided to amend the solicitation and reopen the competition to permit all offerors in the competitive range to respond to the changed requirements.

DECISION

International Filter Manufacturing Corporation (IFM) protests the award of a contract to any other offeror under request for proposals (RFP) No. DLA700-88-R-2808, issued by the Defense Logistics Agency (DLA) for filter elements.

We deny the protest.

The solicitation was issued on September 6, 1988, for filter elements, National Stock Number (NSN) 2940-01-131-7666, to be manufactured in accordance with Drawing Number 65408 B-D48, amendment 2. The solicitation included the clause entitled, "Notice of Evaluation Preference for Small Disadvantaged Business Concerns," which provides that for purposes of price evaluation and comparison a factor of

10 percent of the offered price will be added to offers received from other than small disadvantaged business (SDB) concerns. Three amendments to the solicitation were issued and October 21, 1988, was established as the closing date for the receipt of proposals.

Six offerors responded to the RFP by the closing date. Donaldson Company, Inc., submitted the apparent low price of $34.77 per unit for its part number P52-1683. IFM, which certified that it was an SDB, submitted a price of $37.05 per unit. Subsequently, DLA learned that the specification for the filter element was incorrect. As a result, on November 17, DLA issued amendment No. 4 to the RFP which, among other things, revised the dimensions of the filter element and incorporated the most recent revision to the drawing. The updated drawing required the use of fire retardant material for the filter media and added a dimension for the center tube diameter. Responses to amendment No. 4 were due by November 28.

Donaldson returned amendment No. 4 by the due date; IFM did not acknowledge the amendment, and now states that it did not receive the amendment until after its protest was filed. After the responses to amendment No. 4 were received and reviewed, the contracting officer awarded a contract to Donaldson as the low, technically acceptable offeror on January 6, 1989. IFM was informed of this decision by a notice which indicated that its offer was not accepted because it was not low after all evaluation factors were considered. Following its receipt of this notice, IFM protested to DLA that Donaldson's $34.77 offer becomes $38.25 when evaluated with the 10 percent SDB factor and thus that IFM's $37.05 offer was in fact the low evaluated offer.

After reviewing IFM's protest, DLA agreed that it erroneously failed to apply the evaluation preference to Donaldson's offer. DLA also found, however, that IFM failed to acknowledge amendment No. 4 to the RFP, which was a material amendment, and thus was not eligible to receive the contract award on the basis of its initial offer. In order to give IFM the opportunity to acknowledge amendment No. 4, DLA decided to issue a stop-work order to Donaldson and to reopen negotiations with all offerors in the competitive range. Amendment No. 5, which reopened negotiations, was issued on March 17; amendment No. 6, which established April 14 as the due date for responses to amendment No. 5, was issued on March 28.

Subsequently, DLA also discovered that while the part Donaldson had offered meets its needs, it does not comply

with all the requirements of the drawing. DLA also recognized that the dimensions for the filter listed in the item description were defective. As a result, DLA now plans to reopen the solicitation with a revised item description and list the Donaldson part number and a United Air Cleaner Company part number as additional acceptable filters. IFM contends that it is entitled to the award based on its status as the low evaluated offeror following the submission of initial proposals and thus that DLA improperly reopened the competition.

While the concept of responsiveness is not technically applicable to negotiated procurements, even in a negotiated procurement the procuring agency does not have discretion to disregard an offeror's failure to satisfy a material RFP requirement in its proposal. Industrial Lift Truck Co. of New Jersey, Inc.; Doering Equipment, Inc., B-230821; B-230821.2, July 18, 1988, 88-2 CPD ¶ 61. Here, the agency asserts and IFM does not dispute that amendment No. 4 to the RFP established a material requirement because a filter that did not comply with the changes incorporated in the amendment would be unacceptable for DLA's intended use. Thus, since IFM did not acknowledge amendment No. 4, DLA properly concluded that IFM's proposal was unacceptable as submitted. See CDA Inc., B-224971, Feb. 13, 1987, 87-1 CPD ¶ 163. Accordingly, DLA could not properly make award to IFM on the basis of its initial proposal.

Instead of rejecting IFM's offer, as it could have done in view of IFM's failure to acknowledge amendment No. 4, DLA gave IFM an opportunity to respond to the amendment. Allowing IFM to remedy its failure to acknowledge the amendment constituted opening discussions with the firm. Galaxy Aircraft Instruments Co., Inc., B-194356, May 28, 1980, 80-1 CPD ¶ 364. Once DLA opened discussions with IFM, DLA was obligated to conduct discussions with all the offerors in the competitive range. Keystone Engineering Co., B-228026, Nov. 5, 1987, 87-2 CPD ¶ 449. Thus, DLA's actions once it realized that IFM failed to acknowledge amendment No. 4 were entirely proper.

IFM argues that its failure to acknowledge amendment No. 4 did not justify not making award to IFM based on its initial proposal since the amendment had not yet been issued as of the initial due date for receipt of proposals. According to IFM, since its proposal was acceptable as of the initial closing date, it was entitled to award at that time. We find this argument to be without merit.

The record shows that after initial proposals were received on October 21, DLA discovered that the specifications were

defective and referenced an outdated drawing. Once DLA determined that the RFP was defective and the item it described would not meet its needs, DLA could not properly make award under the RFP. On the contrary, Federal Acquisition Regulation § 15.606(a) requires the contracting officer to issue an amendment to the solicitation when, either before or after receipt of proposals, the government changes, relaxes, increases or otherwise modifies its requirements. In accordance with this provision, DLA issued amendment No. 4 on November 17 to make the necessary changes to the solicitation and required responses to the amendment by November 28. The subsequent award to Donaldson on January 6 thus was properly based on all the information Donaldson had submitted to date, including Donaldson's acknowledgment of amendment No. 4.

IFM also argues that its offer should not have been rejected for failure to acknowledge amendment No. 4 because IFM did not receive a copy of the amendment until March 20, in connection with its protest. We have consistently held that the risk of nonreceipt of an amendment generally rests with the offeror. Thus, the fact that one offeror does not receive a material amendment to the solicitation, and is thereby precluded from receiving the award, has no effect on the validity of the award to another offeror where full and open competition and reasonable prices are obtained and the record does not show a deliberate attempt by the agency to exclude the offeror from the competition. CDA Inc., B-224971, supra. Here, the record shows that six offers were received, and IFM does not contend, nor is there any indication in the record, that reasonable prices were not obtained.

Further, to the extent IFM asserts that its failure to receive amendment No. 4 was due to bad faith on DLA's part, the record does not support IFM's view. In this regard, the agency has submitted the annotated offerors list which shows that IFM was mailed a copy of amendment No. 4 on the same date the other offerors were mailed the amendment. In addition, after IFM protested to DLA, the agency reopened the competition to permit IFM to acknowledge amendment No. 4 and become eligible for award, an action on DLA's part we find inconsistent with the allegation that DLA was deliberately attempting to exclude IFM from the competition.

Finally, IFM argues that Donaldson's proposal should be rejected because it did not offer a part that meets the requirements of the solicitation as initially issued. This argument is without merit. Where, as here, an agency discovers that because the specifications overstate the agency's needs they are restrictive of competition, the

agency should revise the specifications to reflect the relaxed requirements and either conduct discussions with all offerors in the competitive range based on the less restrictive specifications or resolicit its requirements. Chromatics, Inc., B-224515, Feb. 17, 1987, 87-1 CPD ¶ 171. Thus, when DLA learned that the proposal submitted by Donaldson did not comply with the solicitation, but did meet DLA's needs, the agency properly decided to revise the specifications and reopen the competition.

The protest is denied.

James F. Hinchman
General Counsel