Class

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Medical Research Laboratories, Inc.

File: B-235243

Date: July 17, 1989

DIGEST

1. In limited circumstances, award may be made on the basis of initial proposals, without discussions and final offers. However, even where the circumstances are present, award on the basis of initial proposals is permissive, not mandatory.

2. Protest that revision to specifications unduly restricts competition is denied where agency explains that the specifications were revised to provide offerors a clear description of the minimum requirements, and protester presents no evidence to dispute the agency position.

DECISION

Medical Research Laboratories, Inc. (MRL) protests the award of a contract to Physio Control Corporation under request for proposals (RFP) No. N00123-88-R-5666, issued by the Naval Regional Contracting Center, San Diego, for electrocardiograph monitor recorders (ECGs)1/ and defibrillators2/ for use in mobile fleet hospitals. MRL requests that the Navy be directed to cancel the award to Physio and to make award under the RFP to MRL on the basis of initial proposals. MRL also requests that it be reimbursed its proposal preparation and protest costs.

The protest is dismissed in part and denied in part.

1/ ECGs monitor the vital signs of patients and provide a graphic visual display of the functioning of a patient's heart.

2/ Defibrillators provide a momentary jolt of electrical current to a patient who has suffered cardiac arrest or other cardiac disfunction in an attempt to reestablish a regular heartbeat.

The solicitation, issued on July 8, 1988, called for proposals on a brand name or equal basis. The brand name items specified for the ECG and the defibrillator were Physio brand name products. The RFP listed several salient characteristics for both items. The RFP provided that offerors proposing equal products must include all descriptive materials necessary for the purchasing activity to determine whether the product offered meets the salient characteristics. The RFP specifically warned that the contracting activity would not be responsible for locating information about the offered product which was not contained in the proposal or which was not reasonably available. Award was to be made to that responsible offeror proposing the lowest price for equipment meeting the requirements of the solicitation. The RFP also advised offerors that the government may award the contract on the basis of initial proposals and that initial proposals should present the best offer to the government.

Three offers were received by August 25, the closing date for receipt of proposals. MRL's offered price was $829,614 but MRL was determined to be technically unacceptable for failure to satisfy three of the salient characteristics. Physio's offered price was $992,074. The agency made award to Physio on December 21, without holding discussions.

MRL was notified of the award and the determination of technical unacceptability by letter dated January 12, 1989. MRL subsequently protested to the contracting officer, objecting to the technical unacceptability determination and arguing that the Navy's failure to conduct discussions with MRL and the Navy's award to a higher priced offeror were improper. In response, by letter dated April 4, the contracting officer determined that although MRL's initial offer did not comply with the salient characteristics, negotiations should have been conducted to ascertain whether MRL could have revised its proposal to make it technically compliant. Consequently, the contracting officer stayed performance of the contract awarded to Physio, revised the specifications in order to more accurately describe the Navy's needs, and requested revised offers from both MRL and Physio. On April 19, MRL protested the contracting officer's determination to our Office. The Navy subsequently awarded a second contract to Physio as the low technically acceptable offeror in June based on the revised offers, after apparently terminating for convenience the previous improperly awarded contract.

MRL contends that it should have been awarded the contract on the basis of initial offers, as the Navy's initial determination of MRL's unacceptability was arbitrary,

capricious and without rational basis. MRL argues that since the Navy has "admitted" that the procurement was improperly awarded, the only meaningful remedy for MRL would be award to MRL on the basis of its initial offer. We do not agree.

First, the record show that the Navy did not at any time consider MRL's initial offer to be technically acceptable, although the Navy subsequently recognized that MRL's initial proposal could have been made acceptable through discussions. As a result, discussions were held with MRL and revised offers were solicited, giving MRL the opportunity to submit a compliant proposal.

Second, a firm has no right to award on the basis of initial proposals. Generally, in negotiated procurements, agencies must conduct written or oral discussions with all responsible offerors within the competitive range before awarding a contract. These offerors must be given an opportunity to revise their proposals, including cost or price, by a common cutoff date. Federal Acquisition Regulation (FAR) § 15.609-15.611 (FAC 84-16). In limited circumstances, award may be made on the basis of initial proposals, without discussions and final offers. FAR § 15.610. However, even where the circumstances are present, award on the basis of initial proposals is permissive, not mandatory. Joseph L. De Clerk and Assocs., Inc., B-221723, Feb. 10, 1986, 86-1 CPD ¶ 146. We therefore reject the protester's argument that it should have received the award based on initial proposals.

MRL also maintains the Navy erred by failing to notify MRL of the Navy's rejection of its proposal until a month following the initial award and improperly finding the firm's proposal technically unacceptable.

Since the Navy has admitted that, under these circumstances, award on the basis of initial proposals was improper and has implemented the only corrective action that we could have recommended under the circumstances (reopening of the competition), we think that no useful purpose would be served by our further consideration of these protest grounds. See J. Sklar Mfg. Co., Inc., B-213708, July 25, 1984, 84-2 CPD ¶ 110. In this regard, any prejudice MRL may have suffered because of the Navy's delay in sending MRL notice that its proposal was unacceptable and the contracting officer's determination that MRL's initial offer was unacceptable was remedied by the Navy's staying the performance of the contract awarded to Physio and by reopening the competition and by conducting a new technical

acceptability. Consequently, we dismiss these protest bases as academic.

MRL also contends that the revised salient characteristics are unduly restrictive of competition. MRL argues that the Navy added more unique and unimportant characteristics of the Physio unit to provide additional grounds for an illegal sole-source procurement. It is MRL's position that the Navy revised the specifications in an attempt to create subjective criteria on which to base future rejections of the MRL equipment. However, MRL did not identify which of the revised specifications were unduly restrictive.

The Navy states that, contrary to MRL's assertions, the specifications were revised to provide the offerors a clear description of the minimum requirements necessary for field hospital use. The contracting officer revised the specifications for three reasons: to incorporate critical features which had been omitted from the original specifications; to reword requirements more precisely, and add industry-wide standards; and to explain a durability requirement which was set forth only in general terms in the original specifications.

MRL has failed to respond to the Navy's assertion that the revisions to the specification merely provided the offerors a clear description of the minimum requirements necessary for field hospital use. In fact, MRL has presented no evidence other than its bare initial assertion to show that the Navy's use of the revised specification was unduly restrictive. Accordingly, we see no basis to conclude that the revisions are unreasonable. See W. A. Whitney Corp., B-227082, July 7, 1987, 87-2 CPD ¶ 20.

With respect to MRL's claim for reimbursement of the costs of preparing its proposal and its costs of filing and pursuing the protest, our authority to allow the recovery of such costs is predicated upon a determination by our Office that an agency has acted contrary to law or regulation. 31 U.S.C. § 3554(c)(1) (Supp. IV 1986). Since we have made no such determination here, we have no basis for awarding costs to MRL.

The protest is dismissed in part and denied in part.

for Seymour Efros
James F. Hinchman
General Counsel