

A. Kelly



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Independent Business Services Inc.

File: B-235569.3

Date: November 2, 1989

DIGEST

1. Contracting agency's decision to terminate the contract which it had awarded and to make no award to any other offeror, including the protester, is reasonable where as the result of post-award protests it concludes that no technically acceptable proposal was received.
2. Contracting agency has the authority to decide when the negotiation and offer stage of a procurement is finished and an offeror has no legal right to insist that negotiations be reopened and attempt to modify its technically unacceptable proposal after best and final offers are submitted.

DECISION

Independent Business Services Inc. (IBS) protests the failure of the contracting agency to award it a contract under request for proposals (RFP), No. F33600-88-R-0177, issued by the Department of the Air Force for an indefinite quantity contract for a maximum of 500 high- and low-speed laser printers and associated software, training and maintenance over a 3-year period. The Air Force terminated the contract it had awarded to another offeror and decided to make no award under this solicitation because it determined that none of the offers were technically acceptable. IBS alleges that the low-speed printer it offered did comply with the solicitation's requirements; that it therefore should have received an award under the procurement; and that the Air Force canceled the RFP as a means of eliminating IBS from any further competition.

We deny the protest.

The RFP called for both high- and low-speed printers for use in a warehouse environment for barcoding. Proposals were received from seven offerors. IBS's offer was limited to the RFP's low-speed printer requirements. It proposed to

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furnish a low-speed printer whose size admittedly exceeded the maximum height requirements stated in the RFP. After a review of its requirements, however, the Air Force relaxed the height specifications so as to include IBS's proposal within the competitive range. Following discussions with the six offerors in the competitive range, the agency requested best and final offers (BAFOs) from five offerors, including IBS. After evaluation of BAFOs the agency awarded the contract to Unisys Federal Information Systems as it offered the lowest evaluated price and technically acceptable equipment.

IBS and Xerox Corporation protested the award challenging Unisys's compliance with the size requirements in the specifications. The Air Force states that its subsequent review of all proposals established that not only did Unisys's proposed machine exceed the maximum dimensions, but so did the machines proposed by all of the offerors. The contracting officer terminated Unisys's contract for the convenience of the government. The Air Force also concluded that none of the printers offered met the solicitation's maximum size requirements, which it needed to re-determine, and that another specification requirement, for an expandable memory, was no longer needed. The Air Force then issued an amendment to the solicitation which canceled it. Xerox withdrew its protest and we dismissed IBS's protest of the award to Unisys as academic.

IBS then filed the instant protest in our Office in which it alleges that the low-speed printer it proposed did meet the dimension requirements, that it therefore should have received an award for the low-speed printer requirement and that the true motive for the Air Force's action was to eliminate IBS from further competition.

In a negotiated procurement, the contracting officer has broad discretion to cancel a solicitation and needs only a reasonable basis upon which to do so. ACR Elecs., Inc., B-232130.2, B-232130.3, Dec. 9, 1988, 88-2 CPD ¶ 577.

Here, after a reexamination of the proposals and the actual needs of the agency, the Air Force concluded that none of the offerors complied with the dimension requirements. The RFP, as amended, indicated that the dimensions of the low-speed, desk-top printers were not to exceed 33 inches by 26 inches by 19 inches high. While it appeared that the offerors in the competitive range complied with these dimension requirements, the agency discovered during its reevaluation that in calculating the dimensions the offerors excluded attachments such as cassettes, paper trays, connectors and sorters. IBS, in particular, failed to

include in its calculation the paper extension trays, which when added, makes the printer it proposed 36.1 inches wide by 12.3 inches high by 17.9 inches deep.

IBS disputes the Air Force's method of measurement, arguing that the Air Force should disregard the size of the paper tray since it can be folded. We disagree, because, as the Air Force points out, if the paper tray is folded down the printer would not comply with another solicitation requirement that there be a straight paper path.

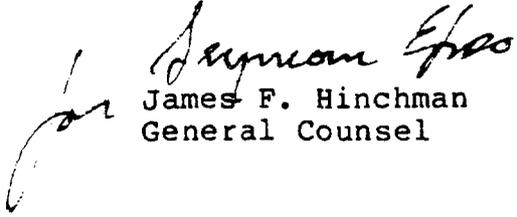
IBS also alleges that the printer it proposed can be modified to comply with the dimension requirements. This is tantamount to a request that it now be permitted to revise its proposal. This modification was only proposed by IBS after BAFOs and after it was notified that all printers exceeded the dimensions. It is the contracting agency's right to determine when the negotiation and offer stage of a procurement is finished, and an offeror has no legal right to insist that negotiations be reopened after BAFOs are submitted. Marshfield Realty Partners Limited Partnership, B-227863, Aug. 14, 1987, 87-2 CPD ¶ 159; Crown Point Coachworks & R&D Composite Structures, et al., B-208694, B-208694.2, Sept. 29, 1983, 83-2 CPD ¶ 386.

IBS also alleges that the Air Force's decision to cancel the solicitation was motivated by bad faith; to eliminate IBS as a competitor. A finding of bad faith requires undeniable proof that the procuring activity had a malicious and specific intent to injure the alleging party. System-Analytics Group, B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57. IBS offers no support for its allegation other than that the agency failed to earlier conclude that all offerors exceeded the maximum dimensions.

We do not think IBS has shown that the Air Force acted in bad faith. Moreover, the fact that it was only after IBS's first protest that the Air Force concluded that none of the offerors complied with the specifications does not preclude cancellation. An agency may properly cancel a solicitation no matter when the information precipitating the cancellation arises, even if that is not until after BAFOs are submitted and the protester has incurred costs in pursuing the award. See System-Analytics Group, B-233051, supra. Since all offerors proposed printers that exceeded the

maximum dimension requirements in the RFP, the solicitation was properly canceled. California Microwave, Inc., B-229489, Feb. 24, 1988, 88-1 CPD ¶ 189.

The protest is denied.


James F. Hinchman
General Counsel