

Morrow



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Delco Construction, Inc.

File: B-237116

Date: February 7, 1990

Rodney A. Delano, President, Delco Construction, Inc., for the protester.
George W. Keeling, President, for the interested party, Frost & Keeling Assoc., Inc.
Milton D. Watkins, Office of the Staff Judge Advocate, Department of the Air Force, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency may reject proposal of offeror who takes exception in its best and final offer to Certificate of Independent Price Determination and explains the circumstances of an exchange of pricing information with another offeror, where the agency determines the exchange had the effect of restricting competition.

DECISION

Delco Construction, Inc. protests the rejection of its proposal under request for proposals (RFP) No. F34650-89-R-0150, issued by the Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, for the repair and/or alteration of certain buildings at Tinker Air Force Base. The Air Force rejected Delco's proposal for allegedly violating the "Certificate of Independent Price Determination."

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We deny the protest.

The closing date for the receipt of initial proposals occurred on September 14, 1989, at which time the Air Force received four proposals. J. Morris and Associates, Inc. was the low offeror at \$849,291, and Delco was the third-low offeror at \$1,024,725. The other two offers were \$1,006,777 and \$1,066,565. Because J. Morris's price was significantly below the range of the other offerors' prices, the Air Force requested verification of its offer. After J. Morris indicated it wished to revise its price and discussions were opened, the Air Force requested verification of prices and best and final offers (BAFOs) from all offerors.

On September 21, BAFOs were submitted by all offerors. J. Morris increased its price by approximately \$90,000 but remained the low offeror. Delco decreased its price and displaced the second-low offeror which only verified its previous price. The fourth-low offeror reduced its price but still remained fourth low. Included with Delco's BAFO was a letter taking exception to the Certificate of Independent Price Determination, subsection (a)(2), which requires offerors to certify:

"The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening . . . or contract award (in the case of negotiated solicitation) unless otherwise required by law."

Delco advised that on September 19, prior to the BAFO request, J. Morris had contacted Delco and disclosed its price after advising that it was the low bidder and would receive the award, which led Delco to discuss the details of its price with J. Morris. 1/

Based upon this disclosure in Delco's BAFO, the Air Force, on September 21, rejected J. Morris's and Delco's proposals pursuant to Federal Acquisition Regulation (FAR) § 3.103-2(b)(2) (FAC 84-47) which provides that, in these circumstances, the agency shall determine whether the disclosure was made for the purpose or had the effect of restricting competition and that if the determination is positive, the bid or proposal shall be rejected; if it is

1/ The amount actually disclosed to Delco approximated J. Morris's BAFO price.

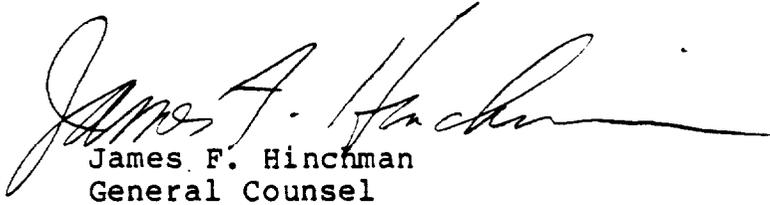
negative, the bid or proposal shall be considered for award. Because J. Morris confirmed Delco's BAFO representation, the Air Force determined that it could not make an affirmative determination that J. Morris's and Delco's mutual disclosures did not have the effect of restricting competition.

Delco protested the rejection of its proposal to our Office on September 22. Award is being withheld pending resolution of the protest.

The Air Force specifically found that Delco's and J. Morris's exchange of pricing information had the effect of restricting competition. In this regard, the Air Force noted that both offerors changed their proposed prices, after these discussions, before BAFOs were submitted. Indeed, Delco lowered its price to displace another offeror. Based on our review of the record, we find reasonable the agency decision under FAR § 3.103-2(b)(2) to reject Delco's proposal.

However, we note that in its comments on the agency report, Delco advised that J. Morris informed Delco that it had similarly exchanged pricing information with the third low offeror who did not disclose this in its BAFO. Delco asserts that it has tendered to the Air Force a tape recording that indicates this is the case. Consequently, before proceeding to award to the third low offeror, the Air Force should ascertain whether any such communications occurred, and, if so, reject that offer.

The protest is denied.


James F. Hinchman
General Counsel