

Bene Jam



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Schuerman Development Company
File: B-238464
Date: April 25, 1990

Sam Zalman Gdanski, Esq., for the protester.
Elizabeth L. Kruger, Esq., General Services Administration,
for the agency.
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of the decision.

DIGEST

1. Contracting agency's decision not to reopen discussions after receipt of fourth round of best and final offers (BAFO), in order to give protester the opportunity to incorporate its late price modification, is unobjectionable where the record indicates that protester had an opportunity to and did submit a proposal by the closing date for receipt of final request for BAFOs, and reopening discussions would have added expense and further delayed already lengthy procurement.
2. Protester's unsolicited best and final offer (BAFO), received over 4 months after the date specified for receipt of BAFOs, was properly rejected where none of the exceptions permitting the acceptance of late submissions outlined in the solicitation applied.
3. Contracting agency properly rejected protester's unsolicited best and final offer (BAFO) offering most favorable price to the government, but received over 4 months after the date specified for receipt of BAFOs, where the protester was not the otherwise successful offeror after evaluation of timely submitted BAFOs.

DECISION

Schuerman Development Company protests the award of a lease under solicitation for offers (SFO) No. SFO-MID-60342, issued by the General Services Administration (GSA) to Ronald W. Van Auken, for office space in Boise, Idaho for a

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period of 5 years. Schuerman argues that GSA improperly failed to reopen discussions in order to consider a new lower priced offer from Schuerman.

We deny the protest.

The SFO was issued on June 28, 1988, calling for a minimum of 37,780 to a maximum of 40,000 net usable square feet of office and related space together with 148 on-site parking spaces, for use by the Bureau of Land Management. The SFO contemplated a lease term from March 1, 1990, to February 28, 1995.^{1/} Offerors were required to submit a net price per square foot for rental, and separate base prices per square foot for operating and moving expenses. Price evaluations were to be based on the computed present value of the offers over the term of the lease, using a formula set forth in the SFO. Seven firms, including the protester and the awardee, submitted offers by the initial closing date of July 21.

Van Auker offered 39,320 square feet of office space at \$11.47 per square foot; \$2.14 per square foot in service costs; and \$.33 per square foot in moving costs. Schuerman offered 40,000 square feet of office space at \$12.50 per square foot; \$1.89 per square foot in service costs; and \$.07 in moving costs. In accordance with the formula in the SFO for calculating present value, GSA computed the total cost to the government at \$9.62 per square foot for Van Auker's offer and \$10.17 per square foot for Schuerman's offer.

Following three rounds of negotiations, addendum No. 4 to the SFO, dated May 12, 1989, requested BAFOs by June 5, with offers to remain open until July 15. Both Van Auker and Schuerman submitted timely BAFOs. Van Auker's initial price (\$11.47) remained unchanged throughout the three rounds of BAFOs. In its first BAFO, Schuerman lowered its initial price per square foot from \$12.50 to \$11.50; raised it to \$12 in its second BAFO; and raised it again to \$12.50 in its final BAFO.

On July 14, GSA asked offerors to extend their acceptance periods until September 15; both Schuerman and Van Auker

^{1/} The Bureau of Land Management is currently housed in a building leased from Schuerman. Pending resolution of this protest, the agency continues occupancy of the building as a month-to-month tenant, pursuant to the holdover provision of its current lease, which expired on March 8, 1990.

agreed. Subsequently, by letter dated October 31, Schuerman submitted an unsolicited revision to its BAFO, lowering its BAFO price per square foot from \$12.50 to \$11.50, thereby making its price lower than Van Auker's.^{2/} The contracting officer informed Schuerman that since the October 31 offer was received after the June 5 date for submission of BAFOs, it was considered a late offer, and its acceptability was questionable. The contracting officer stated that the issue would be referred to GSA counsel for advice.

By letter dated November 21, the contracting officer requested offerors to sign, date and return a copy of the letter to GSA, if they agreed to extend their "best and final offers" until January 5, 1990. Van Auker signed and returned the letter extending his BAFO. Schuerman responded by drawing a line through the words "best and final" and inserting the words "most recent" in front of the word "offer," presumably referring to its October 31 offer.

Subsequently, by letter dated January 3, 1990, GSA again requested offerors to sign, date and return a copy of the letter to GSA, if they agreed to extend their "best and final offers" until January 29. Van Auker signed and returned the letter to GSA extending his BAFO. Schuerman responded by drawing a line through the words "best and final," and inserting the words "most recent," in front of "offer," and the phrase "\$11.50 per square foot per year in response to," in front of "Solicitation for Offers #MID60342," in the sentence immediately above Schuerman's signature. The contracting officer ultimately determined that Schuerman's October 31 offer of \$11.50 could not be considered as it was a late offer, submitted well after the June 5, 1989, closing date for receipt of BAFOs. Accordingly, by letter dated January 25, the contracting officer rejected Schuerman's October 31 price reduction as a late offer modification, and informed the protester that award had been made to Van Auker on January 18.

Schuerman argues that in refusing to consider its October 31 offer, GSA improperly failed to take into account changed market conditions, which allowed Schuerman to make the reduced offer. Schuerman further maintains that given the delays associated with this procurement, the contracting officer improperly failed to comply with Federal Acquisition Regulation (FAR) § 15.606(a), which requires the contracting officer to amend the solicitation at any time either before

^{2/} GSA calculated the present value of Schuerman's October 31 offer at \$9.37 per square foot, compared to Van Auker's offer, calculated at \$9.62 per square foot.

or after receipt of proposals, if the government changes its requirements. The protester finally argues that by failing to consider its October 31 offer, the GSA failed to obtain the lowest possible price to the government.

GSA argues that it properly rejected Schuerman's October 31 price reduction, submitted more than 4 months after the June 5, 1989, closing date for receipt of BAFOs. GSA points out that the solicitation contained the standard "Late Submissions" clause, FAR § 52.215-10, which provides that a modification of an offer which is received after the exact time specified for receipt of offers will not be considered, except in circumstances not applicable here. GSA also notes that given the length of time this procurement had been in process (over 18 months); the expenses already incurred in an environmental impact study; the fact that award was imminent since preaward surveys on the Van Auken property had been completed; and the agency's concern over incurring additional unnecessary expenses, the contracting officer properly decided not to delay the procurement any longer by reopening negotiations to give Schuerman the opportunity to incorporate its late price modification. Finally, GSA maintains that the costs to the government associated with Schuerman's late offer would amount to insignificant savings over the full term of the lease, and would in fact be offset by the costs of further delaying the procurement.

As a preliminary matter, we note that the protester's reliance on FAR § 15.606(a) and certain decisions^{3/} cited in its protest is misplaced. The FAR provision and the decisions cited by the protester concern an agency's obligation to reopen discussions where government requirements have changed after submission of BAFOs; here, in contrast, Schuerman merely argues that changed market conditions permitted it to submit a lower price after submission of BAFOs.

An agency may, but is not required to, reopen negotiations with all offerors where one offeror submits a late proposal modification that reduces its price. Rexroth Corp., B-220015, Nov. 1, 1985, 85-2 CPD ¶ 505. The decision whether to reopen discussions is discretionary with the contracting officer. Orlite Eng'g Co., Ltd., B-227157, Aug. 17, 1987, 87-2 CPD ¶ 168. Discussions need not be

^{3/} Schuerman cites Magneco Inc., B-235338, Sept. 1, 1989, 89-2 CPD ¶ 207, and Barrier Wear, Inc., B-236871, Jan. 12, 1990, 90-1 CPD ¶ 48, in support of its argument.

reopened unless doing so is clearly in the government's best interest. See FAR § 15.611(c).

Here, we find that the contracting officer reasonably decided not to reopen negotiations with all offerors merely to consider Schuerman's October 31 price modification. The decision was based in large part on the fact that Schuerman's price reduction was not offered until more than 4 months after the June 5 closing date for receipt of BAFOs, and after the agency had incurred expenses in pre-award activities; the reopening of negotiations which would have been required to consider Schuerman's October 31 late price offer would have added expense and further delayed the procurement. The record also shows that Schuerman had a fair opportunity along with other offerors to submit a final BAFO with its most favorable terms by the June 5 closing date for receipt of BAFOs. We therefore find unobjectionable GSA's determination that it was not in the government's interest to incur the additional time and expenses involved in reopening negotiations. See Rexroth Corp., B-220015, supra.

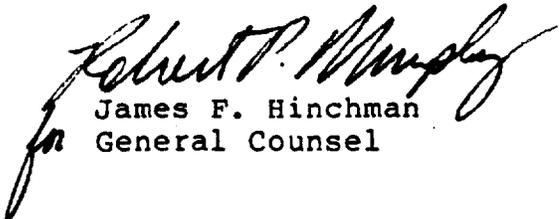
Further, offerors should not be permitted to disrupt unilaterally, and thereby postpone, an orderly procurement procedure by offering late reductions. The Marquardt Co., B-224289, Dec. 9, 1986, 86-2 CPD ¶ 660. We also are concerned with the possibility that an offeror might be lowering its price because it knows that it is not in line for award. Id. In this regard, the record here suggests that Schuerman might have surmised from the agency's pre-award activity that Van Auker was the successful offeror.^{4/} While offerors cannot be prevented from legitimately drawing their own conclusions as to who is in line for award, no offeror is entitled to compel a reopening of competition merely because it has correctly decided that it is not in line for award and lowers its price to improve its competitive advantage. Id.

To the extent that Schuerman asserts that GSA was authorized to accept its late offer because it was more favorable than Van Auker's offer, paragraph (c) of the "Late Submissions" clause of the SFO states in part that "a late modification of an otherwise successful offer which makes its terms more favorable to the government will be considered at any time

^{4/} The contracting officer states that shortly before Schuerman's price reduction was submitted, Schuerman asked the contracting officer to confirm a rumor that Van Auker was in line for award. Schuerman does not dispute the contracting officer's statement.

it is received and may be accepted." This clause allows the government to accept more favorable terms only from an offeror that would be in line to receive the contract, prior to submission of the late offer; it does not permit acceptance of a late modification from a firm not already in line for award. See Sunset Realty Sales Assocs., B-221390, Mar. 31, 1986, 86-1 CPD ¶ 303. A comparison of Van Auker's and Schuerman's BAFOs, submitted by the June 5 closing date, shows that Schuerman's price was higher than Van Auker's, and thus that Schuerman was not in line for award. As a result, there was no basis for accepting a modification of Schuerman's unsolicited October 31 offer, received after the date set for submission of BAFOs.

The protest is denied. Since we find the protest without merit, we also deny the claim for reimbursement of bid preparation and protest costs. Kos Kam, Inc., B-221806, May 14, 1986, 86-1 CPD ¶ 460.


James F. Hinchman
General Counsel