



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Essex Electro Engineers, Inc.
File: B-238207; B-238207.2
Date: May 1, 1990

Fred Israel, Esq., Israel and Raley, for the protester.
Maryann L. Grodin, Esq., Department of the Navy, for the agency.
Amy M. Shimamura, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where awardee's best and final offer (BAFO) is sent by facsimile transmission (FAX) 4 days prior to the closing date for BAFOs, but FAX is not time/date stamped by the contracting agency upon receipt, protest that agency failed to provide evidence of timely receipt is denied where protester does not contest that FAX was sent 4 days prior to the BAFO deadline, as indicated on the FAX copy, and the agency's receiving employee attests that the FAX was timely received.
2. Where, after submission of best and final offers, contracting agency reduces its need for an item by one-half and awards a contract based on an evaluation of only one rather than two lots of the item as specified in the solicitation, agency did not improperly award the contract without amending the solicitation to reflect the reduced requirement because offerors were on notice that they were competing for only one contract for one-half of the requirement if a split award were made, and therefore were not prejudiced by the change.

DECISION

Essex Electro Engineers, Inc., protests the award of a contract to Primetec, Inc., under request for proposals (RFP) No. N00164-89-R-0099, issued by the Naval Weapons Support Center (NWSC), Crane, Indiana, Department of the Navy, for electronic rework power units (RPU's). Essex contends that the Navy failed to award the contract on the

048406/141261

basis of the RFP's evaluation criteria, and that, in any event, Primetec was not eligible for contract award because the firm did not submit a timely best and final offer (BAFO).

We deny the protest.

The RFP, issued on May 1, 1989, required prices for a first article of the RPU and Lots I and II of the item. Each lot included a base quantity of 234 units (line item Nos. 0002 and 0009) and six options for varying quantities of the item, for a total of 966 units per lot. The RFP advised offerors that the government's minimum requirement was 468 units and that line item Nos. 0002 and 0009 would be awarded to meet this requirement. The RFP also stated that if it was in the government's best interest, there was the possibility of multiple contract awards; in that event, Lots I and II would be awarded to the first and second-low offerors, respectively.

Fourteen proposals were received by the June 8 closing date. Discussions were conducted by telephone with all offerors on September 20. The agency advised Essex, the fourth-low offeror, that its "all or nothing" proposal for both lots would be eliminated from consideration if the government decided to make multiple awards. During discussions, offerors were advised that BAFOs were due on September 25.

Thirteen BAFOs were submitted by the closing date for BAFOs. Essex submitted two alternate offers: proposal A, which had no "all or nothing" qualification, and proposal B, the same "all or nothing" offer that it initially submitted for both lots. The protester's "all or nothing" proposal B offered the lowest unit price; Primetec's unqualified offer was the third-lowest unit price; and Essex's unqualified proposal A was the fourth lowest. After the second-low offeror was eliminated from the competition because of a negative pre-award survey and failure to receive a certificate of competency (COC) from the Small Business Administration (SBA), Primetec became second low, and Essex's proposal A became third low.

Three months after the submission of BAFOs, the Navy recalculated its RPU requirement and determined that only 200 units, rather than the 468 units stated in the RFP, would be required. The Navy therefore awarded a contract to Primetec on December 21 for line item No. 0002 of Lot I, or 234 units, a number sufficient to meet its needs and provide additional spare units. Essex's proposal B, which offered a lower unit price for Lots I and II, was not considered for

contract award because it was a qualified offer for both lots only.

Essex contends that since the RFP clearly required the award of both Lots I and II, contract award should have been made on that basis. According to Essex, under the RFP's evaluation scheme, it was entitled to an award of a contract for either Lot II, based on its proposal A, if the Navy had determined to split the award, or both lots, if one contract had been awarded for the total number of items, based on its lowest-priced proposal B. The protester also argues that where, as here, there is a material change to an agency's requirements, an amendment to the solicitation must be issued and offerors given an opportunity to revise their proposals. In this regard, Essex contends that if it had known of the change in the evaluation scheme, it might have lowered its price. Finally, based on the Navy's abstract of BAFOs which shows that Primetec failed to submit a BAFO, Essex contends that the awardee's failure to submit a BAFO makes the firm ineligible for contract award.

The Navy responds that the award of a contract for only one lot was proper because under the RFP's contract award clause, Federal Acquisition Regulation (FAR) § 52.215-16(d), the government reserved the right to make an award on any item for a quantity less than the quantity offered. The Navy also states that the agency's reduced requirement did not require reopening discussions and requesting a second round of BAFOs because an analysis of the submitted BAFO prices showed that no further reductions in prices would be likely. Finally, the Navy states that the notation on the abstract that Primetec submitted "no BAFO" was an inadvertent entry, and that the awardee did, in fact, submit a BAFO and therefore was eligible for contract award.

PRIMETEC'S BAFO

The record indicates that Primetec sent its BAFO to the Navy by facsimile transmission (FAX) at 12:36 p.m. on September 21, 4 days before the September 25 deadline. Although the copy of the FAX that was provided to our Office shows that the FAX was not time/date stamped upon receipt by the Navy, the Navy contract specialist who handled the correspondence attests to the fact that the FAX was received on September 21 and that a "hard copy" of the BAFO was also received prior to the BAFO deadline. The protester contends that there is no evidence that the FAX was timely received by the Navy, but does not contest the fact that the FAX was sent at 12:36 p.m. on September 21, as indicated on the FAX copy.

While we recognize that FAX transmissions are sometimes delayed because of an overload in the transmission system, normally correspondence transmitted at 12:36 p.m. on one day will be received on the same day. A delay of more than 4 days, as the protester suggests, would be highly unlikely. Under the circumstances, since Essex has provided no evidence in support of its contention that Primetec failed to submit a BAFO, we have no basis upon which to question the Navy's attestation that Primetec's BAFO was timely received, and that the "no BAFO" notation on the abstract of BAFOs was an inadvertent entry.

AWARD OF ONLY ONE LOT

With regard to its decision to award a contract for only one lot, the Navy's position is that, notwithstanding the statement in the RFP's Schedule that both Lots I and II would be awarded, under the RFP's contract award clause, FAR § 52.215-16(d), the Navy was authorized to award a contract for only one lot without amending the RFP and giving offerors an opportunity to revise their offers.

We note, however, that under the RFP's "order of precedence" clause, FAR § 52.215-33, any inconsistency in the solicitation is to be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and instructions; (c) contract clauses; (d) other documents, exhibits and attachments; and (e) the specifications. On this basis, the Schedule, which included the explicit statement that both Lots I and II would be awarded, prevails over the RFP's contract award clause; the RFP thus calls for award to be made in accordance with the Schedule, which stated that either one combined or two split awards for 468 units would be made.

In reliance on the language in the Schedule, Essex argues that the Navy was required to make award for the total quantity of 468 units, either as a single combined award (for which Essex's proposal B was lowest priced) or through split awards (in which case Essex would have received one of the contracts pursuant to its proposal A). We disagree.

A contracting agency may not properly award a contract for a quantity which exceeds its minimum needs. See 48 Comp. Gen. 103 (1968). Since the Navy found that it needed only half the number of total items called for by the RFP, it could not make an award for the total quantity, as Essex suggests. At most, a contracting agency under these circumstances would have to reopen discussions and consider revised offers based on its reduced requirements, or if the

change in requirements was significant enough, cancel the RFP and resolicit. As discussed below, however, we see no basis to object to the decision to award only one lot without reopening discussions here, since there is no showing of prejudice to the offerors as a result of the Navy's decision.

Where, as here, the government changes its requirements after the receipt of BAFOs, it generally must issue a written amendment to notify all offerors of the changed requirements in order to afford them an opportunity to respond to the revised requirements. FAR § 15.606; Diversified Computer Consultants, B-230313, B-230313.2, July 5, 1988, 88-2 CPD ¶ 5. However, we will only sustain a protest of the agency's failure to issue a written amendment notifying offerors of a change in requirements where this change affected the selection decision or was otherwise prejudicial to the protester. FKW Inc. Sys.; ColeJon Mechanical Corp., B-235989; B-235989.2, Oct. 23, 1989, 89-2 CPD ¶ 370.

In this case, in addition to advising offerors that 468 units would be awarded, the RFP clearly advised that multiple awards were a possibility, in which case the two lowest offerors each would receive a contract for one lot only, or 234 units. Consequently, offerors were on notice that they were competing for award of either 468 or 234 units. Thus the agency's decision to make award for only one lot, or 234 units, reasonably would not be expected to materially affect how offerors calculated their prices, and the offerors therefore were not prejudiced as a result of the decision to make award without reopening discussions.

With regard to prejudice, Essex contends in its comments on the agency report that it deliberately priced its unqualified proposal A so that its unit price would be second lowest, and qualify for award of the Lot II contract in the event that the Navy determined to award multiple contracts. Thus, Essex argues, it might have submitted a lower price had it known that the Navy would award only one contract.

The record indicates that if multiple awards had been made, Essex's low "all or nothing" proposal B would have been eliminated from the competition, and with the subsequent elimination of the second-low offeror as nonresponsible, Primetec's unqualified proposal would have been low and in line for the Lot I contract and Essex's unqualified proposal A would have been second low and eligible for the Lot II contract.

Although Essex now contends that it deliberately intended this result and was therefore prejudiced by the Navy's failure to award a contract for Lot II, the protester fails to support its contention by either showing how it priced proposal A so it would be in the competition for the Lot II contract only, or how it determined that proposal A would be second low. The record indicates that the second-low offeror failed to cooperate with the SBA during its COC procedure and also failed to submit a BAFO. Essex could not have foreseen this eventuality, which resulted in its being the second-low offeror and eligible for a contract for Lot II. Further, Essex only raised the argument that it intended to be second low in its comments on the agency report after learning from the report that it would have been eligible for the Lot II contract after the elimination of the second-low offeror. In these circumstances, since the protester has not shown how it priced its proposal to compete for the Lot II contract only, we can only conclude that Essex was actually offering its lowest unit price in its unqualified proposal A.

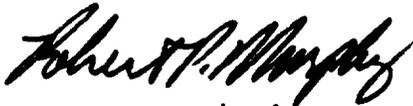
Further, even if Essex was, in fact, deliberately offering a price that was higher than its lowest price with the expectation that it would be second low and eligible for the Lot II contract, the protester must bear the consequences of its pricing strategy. When the Navy requested BAFOs, offerors were on notice to provide the agency with their best--in other words, lowest--unit price. If Essex failed to do so, it cannot now complain that it was prejudiced as a result. See Duracell, Inc.; Altus Corp., B-229538 et al., Feb. 12, 1988, 88-1 CPD ¶ 145.

Since offerors were on notice that they were competing for one contract for 234 items, if multiple awards were made, and the offerors therefore were presumably offering their lowest unit price for the 234 units, we conclude that Essex and the other offerors were not prejudiced by the Navy's failure to issue an amendment notifying competitors of the reduced requirement.

Essex also contends, in its comments on the agency report, that the Navy has failed to substantiate any reduction in its original requirement of 468 units. In support of its contention, Essex notes that the Naval Sea Systems Command (NAVSEA) letter describing the reduction in the requirement and the consequent reduction in funding for the requirement is dated January 12, which is after the December 21 contract award to Primetec and the January 3 filing of this protest.

A review of additional documents provided by the Navy in response to this allegation indicates that NAVSEA began a review of its RPU requirement, based on an estimate of its potential workload, after the May 1 issuance of this solicitation. The results of this review were made available to NWSC on December 15. While the January 12 letter from NAVSEA to NWSC, memorializing the revised estimate and reduced funding requirement, postdates contract award, that letter does not support Essex's contention the Navy has failed to substantiate its reduced RPU requirement. On the contrary, the January 12 letter explains why the reduction was necessary and clearly indicates that the review was taking place concurrently with the procurement. While we question the Navy's judgment in proceeding with the procurement while the RPU requirement was being reassessed, we do not think that the January 12 letter provides a basis to question the Navy's statement that its RPU requirement had been reduced.

The protest is denied.



for James F. Hinchman
General Counsel