



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Byrne Industries, Inc.

File: B-239200

Date: August 13, 1990

Alan M. Lestz, Esq., Witte, Lestz & Hogan, P.C., for the protester.

J. Eric Andre, Esq., Crowell & Moring, for Mine Safety Appliance Co., and Richard L. Moorhouse, Esq., Dunnells, Duvall, Bennett & Porter, and Robert G. Bugge, Esq., for Racal Corp., interested parties.

Jeffrey I. Kessler, Esq., and Joseph M. Picchiotti, Esq., Department of the Army, for the agency.

Barbara Timmerman, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's three requests for price verification of low offer, after submission of initial offers and before submission of best and final offers, were not improper, coercive, or misleading when circumstances reasonably lead the agency to question whether the offeror may have made a mistake in its offer in view of the previous prices paid for the item and the low offeror's inexperience in producing the item.

2. Protest that prices may have been disclosed to the protester's competition is denied where the allegation is primarily based on the awardee's reduction of the prices in its best and final offer to levels slightly below protester's initial prices.

DECISION

Byrne Industries, Inc. protests the award of a contract to Mine Safety Appliances Company under request for proposals (RFP) No. DAAA09-89-1294 issued by the Department of the Army for 1,246,344 C2 canisters. The canisters are replacement filters for gas masks. Byrne contends that the Army improperly induced it to increase its low prices and disclosed its prices to the awardee.

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We deny the protest.1/

The RFP, issued on October 18, 1989, requested offerors to furnish fixed prices for the canisters, both with and without first article testing, and for delivery on an f.o.b destination and f.o.b. origin basis. The RFP basically provided for award to the offeror proposing the low evaluated fixed price.

On the January 12, 1990, closing date the Army received six proposals in response to the RFP. Byrne was the apparent low offeror with unit prices, based on first article testing, of \$6.695 f.o.b. destination and \$6.595 f.o.b. origin.2/ According to the agency, because Byrne's price was considerably lower than the price the Army had paid in three earlier procurements and because Byrne had not previously supplied the canisters, it suspected a possible error in Byrne's bid and therefore requested verification. Byrne confirmed its prices in writing.

Byrne and the second low offeror were then separately notified that they would be subject to a preaward survey conducted by the Defense Contract Administration Services Management Area--Springfield, N.J. (DCASMA). Before the two preaward surveys were conducted, the agency issued an amendment to the solicitation involving quality inspection and testing requirements and requesting best and final offers (BAFO).3/ After the preaward surveys, during which Byrne again confirmed its prices, the agency issued two further amendments and extended the closing date for BAFOs to March 16. Two days prior to closing, on March 14, an Army contract specialist telephoned Byrne and advised the

1/ Racal Filters Technologies, Ltd. also submitted several letters as an interested party on the protest. Although these letters requested relief under the RFP, i.e., award, Racal expressly declined to file a protest of this procurement action. Consequently, we will only consider Racal's comments in the context of Byrne's protest.

2/ Byrne did not submit any prices based on waiver of first article.

3/ Byrne has made various allegations that the changes made to the RFP did not warrant a request for BAFOs and the award should have been made on initial proposals. However, these allegations are untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990), since they were not protested prior to the due date for submissions of BAFOs.

firm that its price was very low and should be reviewed carefully.

When it submitted its BAFO 2 days later, Byrne raised all of its prices by \$.195.^{4/} Mine Safety lowered all of its unit prices by \$.56 and became the low offeror.^{5/} On March 29, the agency awarded a contract to Mine Safety based on its low, f.o.b. destination, without first article testing, price.

Byrne argues that the Army's March 14 telephone call was improper and effectively coerced and/or misled it to raise its price because the firm had already confirmed its price twice. In support of this argument, Byrne has submitted the affidavit of its executive vice president stating that but for the March 14 telephone call, it would have lowered the prices in its BAFO as opposed to raising them. Byrne alleges that the agency probably did not have conversations of this nature with any other offeror and alleges the disparate treatment was prejudicial to it.

It is true that an agency may not consciously coerce or mislead an offeror into raising its price. See Eagle Technology, Inc., B-236255, Nov. 16, 1989, 89-2 CPD ¶ 468. However, our review of the record does not indicate that the agency had any such motive.

The Army asserts that its requests to Byrne were consistent with regulatory mistake in proposal procedures. According to the Army, its concerns were justified by Byrne's extremely low prices and its inexperience in producing the item. The record shows that in prior procurements the lowest price the agency paid was \$6.99 per canister, significantly higher than Byrne's prices of \$6.595 and \$6.695.^{6/} Additionally, an earlier contractor had gone bankrupt producing the canisters. We think these circumstances show that the agency's expressions of concern about Byrne's prices were reasonable particularly in light of the fact that Byrne had never furnished the canisters before. In this regard, although there may be, as contended by Byrne, no requirement to repeatedly request

^{4/} Byrne's initial f.o.b. destination unit price of \$6.695 was raised to \$6.89 in its BAFO.

^{5/} Mine Safety's initial fourth highest f.o.b. destination unit price of \$7.146 was lowered in its BAFO to \$6.586.

^{6/} The difference between those prices in a procurement of this size amounts to a total of over \$450,000.

price verification in case of a suspected mistake, there is also no limitation on such contacts where the agency still has legitimate concerns about the low price. See Pamfilis Painting, Inc., B-237968, Apr. 3, 1990, 90-1 CPD ¶ 355. Thus, we do not find these discussions improperly coercive or misleading.

Byrne also maintains that by repeatedly questioning its "low" prices, the contract specialist in effect, improperly informed Byrne of its price standing relative to other offerors and caused Byrne to increase its prices. Since the Army's request to Byrne that it review its prices in accordance with Federal Acquisition Regulation (FAR) § 15.607 (FAC 84-16) because a mistake in the proposed prices were suspected, we do not believe that they constituted violations of the general prohibition against informing offerors of their relative price standing. See FAR § 15.610(d)(3) (FAC 84-16).

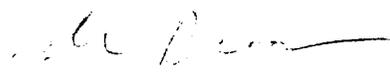
Moreover, we do not find these price verification requests represented improper disparate treatment of the offerors. The Army made a similar request for price verification from the firm that was the second low offeror initially because its prices were only slightly higher than Byrne's and significantly lower than previous prices paid for the item. The Army did not ask Mine Safety to confirm its initial prices, as it did the two low offerors, because the prices of Mine Safety, a previous supplier, were within the range of prices paid previously by the Army. Finally, although the agency did not request Mine Safety to verify its BAFO prices prior to award, the contracting officer states that he had no reason to seek verification in view of the close price competition and since Mine Safety is a current producer of the item.

Byrne also suggests that sometime after it submitted its initial offer, the agency improperly disclosed Byrne's proposed prices to Mine Safety. Byrne maintains that taken together the facts surrounding this procurement establish that a price leak occurred. In particular, Byrne points to the substantial reduction in Mine Safety's BAFO prices to levels only a fraction of a cent lower than Byrne's initial prices, and to a telephone call it received from a competitor (Racal) prior to the preaward survey in which the competitor offered to assist Byrne in the performance of the anticipated contract. The protester alleges that, in combination with the decision to conduct a preaward survey before BAFOs were requested, these facts indicate that the agency revealed its prices.

The agency denies that it disclosed any information concerning Byrne's offer. Both the Army's contract specialist and Mine Safety's contract manager have submitted affidavits stating that no such information was given or received. Racal also submitted an affidavit stating that its call to Byrne was not based on its receipt of any price information from agency officials but on communications with industry material suppliers. Racal's affiant states that these suppliers informed it that they had been told by Byrne that Byrne was the successful offeror.

A price reduction in a competitor's BAFO is an insufficient basis to support a conclusion that the agency disclosed the protester's pricing information where, as here, the record fails to show any evidence of such action. Le Don Computer Servs., Inc., B-275451, Jan. 9, 1987, 87-1 CPD ¶ 46. Nor is closeness in price between two offerors convincing evidence that prices were disclosed where, as here, the unit prices of all but one offeror were relatively close. Further, since Byrne does not dispute the explanation from Racal which indicates Byrne was the ultimate source of its information, we have no reason to question Racal's statement. We therefore conclude that Byrne's allegations are unsupported by any evidence; we will not reach a finding of improper action based on inferences alone. See Keystone Eng'g Co., B-228026, Nov. 5, 1987, 87-2 CPD ¶ 449.

The protest is denied.


James F. Hinchman
General Counsel