D. McArthur

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Raytheon Company

File: B-240333

Date: November 9, 1990

James J. McCullough, Esq., and Richard L. Larach, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.
James J. Regan, Esq., Robert M. Halperin, Esq., and Stephanie B. N. Renzi, Esq., Crowell & Moring, for CAE-Link Tactical Simulation Division, an interested party.
Margaret A. Olsen, Esq., Department of the Navy, for the agency.
C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency conducting an urgent procurement under the authority of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(2) (1988), may make award on the basis of initial proposals whether or not such award represents the lowest overall cost to the government.

DECISION

Raytheon Company, Submarine Signal Division, protests the award of a contract to CAE-Link Tactical Simulation Division under request for proposals (RFP) No. N00019-89-R-0123, issued by the Department of the Navy for the design, fabrication, test and installation of an Update IV operator and maintenance trainer for the P-3C aircraft. The protester contends that the agency improperly made award on the basis of initial proposals.

We deny the protest in part and dismiss it in part.

On July 10, 1987, the agency awarded to Boeing Corporation a prime contract for the Update IV avionics system; as part of its prime contract, Boeing was to award a subcontract for a trainer. Boeing twice requested proposals for the trainer, but in both instances the offers received exceeded the agency's available funding, and the agency decided to procure the trainer by a separate prime contract.

The agency prepared a justification and approval (J&A) dated October 17, 1989, for the use of other than full and open competition as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (1988). The J&A authorized the acquisition of P-3C Update IV operator and maintenance trainers, with associated products and services, citing the authority of 10 U.S.C. § 2304(c)(2), which allows the head of a military agency to use other than competitive procedures when the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.

The J&A stated that the agency estimated that the development period for the trainers would encompass 48 months and that the trainers had to be available by August 1992, to allow training of the crews in time for deployment in January 1993. The J&A evidenced the agency's intention to limit competition to the two potential offerors that Boeing had identified as technically acceptable, based on its subcontracting attempts. The J&A advised the approval authority that, in the opinion of the contracting officer, the limited competition between the two producers identified by Boeing would insure a fair and reasonable cost, but that the agency would evaluate all costs prior to award.

On March 1, 1990, the agency issued the RFP for a fixed-price incentive contract, including numerous option items exercisable in subsequent years, with competition limited to the protester and to CAE-Link Tactical Simulation Division, the two firms that Boeing had recommended. The RFP contained the standard clause, Federal Acquisition Regulation (FAR) § 52.215-16 (FAC 84-40), providing for award to the responsible offeror whose offer was most advantageous to the government, cost or price and other factors considered, and reserving for the government the right to make award on the basis of initial offers, without discussions. The solicitation set forth the evaluation and award factors as follows: technical and price, equal in value but more important than the combined value of the other two factors, which were management/schedule and integrated logistics support.

The agency received initial proposals on March 16, 1990. As a result of our decision, Ferranti Int'l Defense Sys., Inc., B-237760, Mar. 22, 1990, 90-1 CPD ¶ 317, the agency allowed a third offeror an additional period, until April 10, to submit a proposal. On May 4, the agency's procurement review board recommended award to CAE-Link, the low technically acceptable offeror, as most advantageous to the government, even though the protester's proposal offered a slight technical

superiority. On May 31, the agency awarded a contract to CAE-Link. The agency provided a debriefing for the protester on June 26, at which agency personnel stated that although Raytheon's proposal was technically acceptable, the agency could not have accepted it without discussions even if the proposal had been low, since, as Raytheon was aware, it had not offered a firm price for option items.1/ This protest followed.

The protester argues that the agency was precluded from awarding a contract on the basis of initial proposals unless full and open competition or prior cost experience demonstrated that acceptance of the initial proposal would result in the lowest overall cost to the government. The protester asserts that there was not adequate competition for purposes of making an award on the basis of initial proposals since CAE-Link's proposal was the only fully compliant proposal received. Consequently, the protester argues that the agency did not reasonably determine that award to CAE-Link on the basis of its initial proposal would result in the lowest overall cost to the government, especially since the agency should have known that the protester would have reduced its price following discussions. In short, the premise of this protest ground is that the agency, in making an award based on initial proposals, was required to award to the lowest overall cost offeror. We disagree.

The protester is correct that generally an agency may only award a contract on the basis of initial proposals where it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussions would result in the lowest overall cost to the government. See FAR § 15.610(a)(3) (FAC 84-16); Economic Consulting Servs., Inc., B-229895, Apr. 8, 1988, 88-1 CPD ¶ 351. This requirement is derived from CICA, 10 U.S.C. § 2305(b)(4)(A), which provides that where an agency has solicited and received competitive proposals:

> "The head of an agency shall evaluate competitive proposals and may award a contract--
> (i) after discussions conducted with the offerors

1/ Raytheon had reserved for itself in its initial proposal the right to adjust its prices if the agency exercised the options for anything less than the full stated quantities; after submission of initial offers, the protester submitted a letter, dated May 15, withdrawing its reservation. The third offeror was found to be technically unacceptable.

> at any time after receipt of the proposals and before the award of the contract; or
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> (ii) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States."

We think this provision by its terms only applies to the evaluation of "competitive proposals" under competitive procedures. Under CICA, "competitive procedures" are those by which the head of an agency enters into a contract pursuant to full and open competition, which in turn means that all responsible sources are permitted to submit competitive proposals. 10 U.S.C. § 2302(2); 41 U.S.C. §§ 403(6) and (7). Conversely, where an agency has an unusual and compelling need for the property or services, the agency is permitted to limit the number of sources from which it solicits proposals under the urgency exception. 10 U.S.C. § 2304(c)(2). Indeed, an agency using the urgency exception may restrict competition to the only firm that can properly perform the work on a sole-source basis. See Forster Enters., Inc., B-237910, Apr. 5, 1990, 90-1 CPD ¶ 363. It follows that an agency which can award on a sole-source basis under the urgency exception can also dispense with discussions under this exception by awarding to the most advantageous offeror on the basis of initial proposals whether or not award to that offeror represents the lowest overall cost to the government. Accordingly, this protest ground is denied.2/

Finally, the protester also challenges the agency's cost/technical tradeoff. The protester raised this issue at the bid protest conference, held at Raytheon's request on August 20. At that conference, our Office directed the protester to file a written protest raising this issue no later than August 27, 10 working days after the protester learned of its grounds for

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2/ As an additional ground, Raytheon protests the agency's failure to request cost and pricing data from the awardee. Except for the contingency in its option prices which the agency considered minor, Raytheon submitted a technically acceptable offer that was competitively priced. The agency thus received at least two proposals, and based on the record before us, we cannot find that the contracting officer was unreasonable in making the determination not to request cost and pricing data. See FAR § 15.804-3(a)(1) (FAC 84-35).

protest by its receipt of the agency report. See 4 C.F.R. § 21.2(a)(2) (1990). Under our Bid Protest Regulations, 4 C.F.R. § 21.1(b), protests must be filed in writing, and the protester's oral presentation at the August 20 conference did not therefore toll the timeliness requirements of our Office. The protester did not present in writing this issue to our Office until September 12, more than 10 working days after it learned its basis for protest.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel