Evans

146465

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

Decision

Matter of: BDM International, Inc.

File: B-246136.2

Date: April 22, 1992

John F. McCabe, Esq., for the protester.
Joel S. Rubinstein, Esq., Sadur, Pelland & Rubinstein, for National Systems Management Corp., an interested party.
Maj. William R. Medsger and John J. Welling, Esq., Department of the Army, for the agency.
Catherine M. Evans, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's decision to reopen competition after making award to protester based on initial proposals was improper where record does not establish that any offeror was prejudiced by perceived solicitation defect, and record does not support agency's further assertion that proposals were not evaluated properly; reopening of competition thus did not provide any benefit to the procurement system that would justify competitive harm to protester from reopening competition after exposure of protester's price.

DECISION

BDM International, Inc. protests the agency's decision to reopen negotiations and request best and final offers (BAFO) under request for proposals (RFP) No. DAAA08-91-R-0012, issued by the U.S. Army Armament, Munitions and Chemical Command for engineering services. BDM, the awardee under the RFP, alleges that the agency improperly concluded that a solicitation impropriety warranted reopening negotiations after award.

We sustain the protest.

The RFP, issued on March 11, 1991, originally incorporated by reference a standard Federal Acquisition Regulation (FAR) provision for award based on initial proposals. This clause, FAR § 52.215-16, stated that the government "may" make award based on initial proposals without conducting discussions. Shortly after the RFP was issued, the Department of Defense directed all contracting activities to substitute a new clause, FAR § 52.215-16, Contract Award,

Alternate III (Deviation) (Mar. 1991), in all solicitations issued after March 5, 1991 where award without discussions was contemplated. This authorized deviation provided that the government "intends" to make award based on initial proposals without conducting discussions, but reserved the agency's right to conduct discussions if they were later determined to be necessary. The agency amended the RFP on April 25 to delete the reference to the standard clause and incorporate by reference the deviation clause.

Five firms submitted proposals in response to the RFP. Following what the agency termed minor clarifications, BDM's proposal was selected for award. One of the other offerors, National Systems Management Corporation (NSM), protested the award, alleging that the agency in fact had conducted discussions, not clarifications, and that therefore its failure to conduct meaningful discussions and request best and final offers (BAFO) was improper. NSM also claimed that the agency had failed to properly evaluate proposals. Upon reviewing the procurement in response to NSM's allegations, the agency determined that the RFP had not provided offerors with sufficient notice of the probability that award would be based on initial proposals. In this regard, the agency notes that FAR § 52.102-2(a) requires deviations from standard FAR clauses to be set forth in full text rather than incorporated by reference; the agency concluded that the award to BDM based on its initial proposal was improper because offerors were not expressly informed of the likelihood that it would make such an award. In addition, the agency concluded that the offerors' relative standings probably would have been different if they had been advised of their proposal deficiencies and afforded the opportunity to submit revised proposals. Based on these findings, the agency decided to reopen negotiations and request BAFOs from all offerors. Upon learning of the agency's decision, BDM filed this protest.[1]

BDM essentially argues that the agency's corrective action was unwarranted, and creates an improper auction, because there was no impropriety to correct. First, BDM asserts that the agency's failure to include the full text of the provision for award on the basis of initial proposals was a minor procedural defect that did not prejudice any offerors because the text was readily available from the agency upon request or "from widely available compilations of the Federal Acquisition Regulation." Further, BDM challenges as speculative the agency's position that the relative standings of offerors would have been different had discussions been conducted, since all offerors probably would have

---

[1]The agency reports that BAFOs have been received and currently are being evaluated.

improved their proposals to some extent given the opportunity to do so. BDM concludes that the agency's decision to conduct discussions and request BAFOs was improper.

Where an award was improperly made, reopening negotiations, notwithstanding disclosure of the awardee's price, does not constitute an improper auction. The Faxon Corp., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425. On the other hand, where the record establishes that there was no actual impropriety, or that an impropriety did not result in any prejudice to offerors, reopening the competition after prices have been disclosed does not provide any benefit to the procurement system that would justify compromising the offerors' competitive positions. Rexon Tech. Corp., et al., B-243446.2; B-243446.3, Sept. 20, 1991, 91-2 CPD ¶ 262; Cenci Powder Prods., Inc., B-234030, Apr. 17, 1989, 89-1 CPD ¶ 381. As we will explain below, the record does not support the agency's position that the award to BDM based on initial proposals was improper; consequently, we find that the agency's decision to conduct discussions and request BAFOs was not warranted.

The primary reason the agency advances for reopening the competition is its failure to include the full text of the deviation from the FAR provision for award without discussions. While the solicitation's incorporation of this provision by reference violated the FAR requirement that deviation provisions be set forth in full text, the record does not establish, and the agency does not otherwise explain, how any offerors were prejudiced by the omission. The agency's position appears to be based on 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. II 1990), which provides that agencies may not make an award without discussions unless the solicitation includes a statement that proposals are intended to be evaluated, and award made, without discussions.

Although the deviation provision incorporates the statutory language, advising that the government "intends" to make award without discussions--while the standard FAR clause provides that the government "may" award a contract without discussions--both provisions advise offerors that, since award might be made without discussions, offerors' initial proposals should include their best terms. No offeror protested that the failure to include the full text of the deviation misled it into concluding that the agency would request BAFOs and therefore into not including its best terms in its initial proposal. Instead, NSM argued that the agency was required to request BAFOs because it had conducted discussions, not clarifications.

Since offerors were on notice of the requirement to offer their best terms in their initial proposals, and there is no

evidence that any offeror was misled by the solicitation into expecting a request for BAFOs, we find that offerors were not prejudiced by the agency's failure to include the full text of the deviation provision in the amended RFP. This omission therefore did not provide a valid basis for the agency to open discussions after award. See Rexon Tech. Corp., et al., supra.

The agency also asserts that the relative standings of offerors might have been different if it had afforded them the opportunity to correct proposal deficiencies through discussions, and argues that this possibility constitutes a sufficient basis to open negotiations after award and disclosure of BDM's price.[3] We disagree.

An agency has broad discretion to take corrective action when it determines that such action is necessary to ensure a fair and impartial competition. Oshkosh Truck Corp., et al., B-237058.2; B-237058.3, Feb. 14, 1990, 90-1 CPD ¶ 274. While we support agency efforts to correct improprieties at any stage of a procurement and in response to protests, in this case, the agency's decision that it was required to hold discussions and request BAFOs because another offeror could displace BDM was not based on an impropriety or violation of law. Rather, it appears to have been based on the possibility that another offeror could have offered a technical approach as good as BDM's at a lower price. Although this possibility would have warranted a different judgment by the contracting officer about whether to have conducted discussions in the first place, it does not render

---

[3]Although not mentioned by the contracting officer in his written decision to reopen discussions, the agency's legal memorandum accompanying the agency report asserts that some offerors' responses to the sample tasks were improperly downgraded for failure to include information that the RFP did not require, and that discussions should have been conducted in order to inform offerors of the additional required information. The record does not support this assertion. First, although the record does show that several offerors' sample tasks received no points under certain subfactors, the contracting officer's memorandum containing his rationale for reopening negotiations does not explain which subfactors were involved in any improper evaluation, or what information the evaluators were looking for that the RFP had not requested. Based on our comparison of the evaluation records to the RFP instructions, the areas in which offerors' sample tasks were found deficient (e.g., identification of subtasks) in fact were areas the RFP specifically required to be addressed. The record does not reveal any impropriety in the evaluation of the sample tasks factor.

the competition unfair such that a recompetition is warranted.

As discussed above, in its initial protest NSM contended that the agency had already conducted discussions with the offerors and, therefore, was required to request BAFOs. The record does not reflect any response by the Army to this issue, and the agency does not suggest that it represented a reason for reopening the competition. We have examined the communications initially claimed by NSM to constitute discussions, and find that they were requests for clarifications that do not require offerors to be given an opportunity to revise their proposals. FAR § 15.601.

The agency does not argue, and the record does not otherwise suggest, that the agency's original determination that BDM's initial proposal was most advantageous to the government was improper. The agency has not provided any specific reason why the evaluation was deficient or inconsistent with the RFP such that a new evaluation is necessary. As the reopening does not correct any impropriety or otherwise serve the public interest in the integrity of the competitive procurement system, we conclude that reopening the competition was improper. See Rexon Tech. Corp., et al., supra; Cenci Powder Prods., Inc., supra.

Accordingly, we sustain the protest. By letter of today to the Secretary of the Army, we recommend that the agency discontinue its actions under the reopened competition and allow BDM to continue performance under its contract. We also find BDM entitled to the costs of its BAFO preparation and the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1) and (d)(2) (1992).

The protest is sustained.

Milton J. Socolar

Acting Comptroller General
of the United States