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

Decision

Matter of: Ameriko/Omserv--Reconsideration

File: B-252879.4

Date: May 25, 1994

Brian J. Donovan, Esq., Jones & Donovan, for the party requesting reconsideration.
Mary G. Curcio, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Since the statutory and regulatory requirement for discussions with all competitive range offerors means that such discussions must be meaningful, equal and not misleading, there is no merit to argument that misleading discussion advice did not amount to a violation of statute or regulation.

2. Request for reconsideration is denied where request is based on an argument that was available to but not raised by the requesting party during consideration of the initial protest.

3. Request for modification of corrective action recommending that agency reopen discussions and permit competitive range offerors to submit new best and final offers on basis that it places requesting party at a competitive disadvantage is denied where recommendation places parties in the position they would have been in if not for misleading discussions with protester.

DECISION

Ameriko/Omserv requests reconsideration of our decision, DTH Mgmt. Group, B-252879.2; B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227, in which we sustained DTH's protest against the award of a contract to Ameriko under request for proposals (RFP) No. N63397-93-R-5019, issued by the Department of the Navy, for maintenance and operation of military family housing units.

We deny the request.

The RFP contemplated award of a firm, fixed-priced contract to the responsible offeror whose offer was most advantageous

to the government. In reaching the award decision, price and technical factors were considered equal. The RFP also provided that the award could be made to other than the lowest-priced offeror.

As explained in our prior decision, after the Navy evaluated initial offers, seven proposals, including those of Ameriko and DTH, were included in the competitive range. During discussions, the agency notified four of those offerors, including DTH, that their prices were considered unrealistically low for the contract effort. The Navy also advised two offerors that their prices were considered too high and a single offeror was given no advice concerning its price. This advice was based upon a comparison of the offerors' prices to the government estimate. Upon receipt of the best and final offers (BAFO), however, the source selection board (SSB) noted that the offerors' prices indicated a depressed market for facilities maintenance services that was not reflected in the government estimate. Therefore, in considering whether the BAFO prices were realistic, the SSB evaluated the offers against each other rather than against the government estimate. After BAFOs were evaluated, Ameriko's was the lowest-priced offer and was ranked fourth in technical merit. DTH's BAFO was ranked first in technical merit and was fourth low in price. The SSB recommended award to Ameriko based on its conclusion that DTH's technical superiority did not justify its higher price. The source selection authority accepted the recommendation and awarded the contract to Ameriko based primarily on its lower price.

DTH protested that it was misled during discussions because the Navy told it that its price was too low and then awarded the contract to Ameriko because DTH's price was considered too high to justify the technical superiority of its proposal. DTH argued that as a result of the Navy's advice, it refrained from reducing its price to meet the highly competitive market conditions.

In sustaining the protest, we concluded that since the Navy had abandoned its concern with price in comparison to the government estimate, the agency's discussion advice to DTH that its price was too low was misleading. We further found that DTH was prejudiced by the misleading advice because the record strongly suggested that DTH might have significantly reduced its BAFO price had it not been misled. In this respect, the record included an affidavit from a DTH partner which stated that DTH would have reduced its price if it had not been given the misleading advice. In addition, we noted that offerors generally do reduce their prices during negotiations and that the two offerors that were told that their prices were too high in fact reduced their BAFO prices by 11 and 22 percent and that the offeror that was told

nothing about its price reduced it by 6 percent. Since DTH's proposal was the highest rated technically and it did not receive the award simply because its price was too high, we concluded that it was possible that with a substantially lower price, DTH would have received the award. We recommended that the Navy amend the solicitation, reopen discussions with all competitive range offerors, and request revised BAFOs, making award to the offeror whose revised BAFO is most advantageous to the government.

In requesting reconsideration, Ameriko first notes that we concluded that it was likely that DTH was prejudiced by the misleading discussions. Ameriko asserts that such a conclusion is proper only where this Office first finds that a procuring agency violated a procurement regulation or statute. Ameriko argues that in our decision we did not find that the Navy violated any procurement statutes or regulations and therefore that we improperly reached the issue of prejudice. In other words, according to Ameriko, even if the Navy gave misleading advice to DTH, its action did not rise to the level of a violation of a procurement statute or regulation.

We disagree. We have long held that the statutory and regulatory requirement (10 U.S.C. § 2305(b)(4) (Supp. V 1993); Federal Acquisition Regulation (FAR) § 15.610(b)) for discussions with all competitive range offerors means that such discussions must be meaningful, equal, and not misleading. See Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424; Woodward Assocs., Inc.; Monterey Technology, Inc., B-216714.2, Mar. 5, 1985, 85-1 CPD ¶ 274. Moreover, FAR § 1.602-2(b) requires agencies to treat contractors fairly and equitably. Thus, when we found that DTH was unfairly misled by the course of discussions, we viewed the matter as one involving a violation of these statutory and regulatory provisions.

Ameriko also asserts that we should reverse our decision because DTH did not provide sufficient evidence to demonstrate that it was misled or prejudiced by the agency's advice concerning DTH's price. Specifically, Ameriko asserts that the only evidence that DTH was misled or prejudiced is DTH's self-serving statement that it would have lowered its price if the Navy had not told it that its price was already unrealistically low.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must either show that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1994). In order to provide a basis for reconsideration, information not previously considered must

have been unavailable to the requesting party when the initial protest was being considered. Ford Contracting Co.--Recon., B-248007.3; B-248007.4, Feb. 2, 1993, 93-1 CPD ¶ 90. A party's failure to make all arguments or to submit all information available during the course of the initial protest undermines the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of all parties' arguments on a fully-developed record--and cannot justify reconsideration of our prior decision. Id.

Ameriko's argument that DTH did not provide sufficient evidence that it was misled or prejudiced by the Navy's erroneous advice could have been made during the initial protest, but was not. Accordingly, it does not provide a basis for reconsideration. In this regard, Ameriko states that it did not have an opportunity to argue that DTH was not prejudiced because DTH had not argued that it was prejudiced until it submitted its comments on the agency report, and by that time, the record was closed. However, our regulations provide that an opportunity to submit additional comments may be granted if the party concerned requests permission to do so. 4 C.F.R. § 21.3(l). If Ameriko wished to reply to the argument regarding prejudice raised in DTH's comments, it was free to request leave to respond. It did not do so, and therefore we will not consider the merits of this argument on reconsideration. See Lockheed Aeronautical Sys. Co.; Chrysler Technologies Airborne Sys., Inc.; Department of the Air Force--Recon., B-252235.4, Jan. 21, 1994, 94-1 CPD ¶ 45.

In any case, our conclusion that DTH might have lowered its price was not based only on DTH's statement that it would have lowered its price if it had not been told that its price was too low. Rather, we also considered the fact that offerors often lower their prices when they submit BAFOs and the fact that the three offerors who were not told that their prices were too low lowered their prices between 6 and 22 percent.

Finally, Ameriko asserts that our decision is erroneous as a matter of law because it gives DTH a competitive advantage. Specifically, Ameriko asserts that DTH now knows that Ameriko's proposal was significantly lower in price than DTH's and thus DTH will now drastically reduce its price when it submits its BAFO.

We view this argument as a request that we modify our recommendation because it creates an impermissible auction. This argument does not persuade us to revise our recommended corrective action. In our decision, we assumed that if the Navy had not misled DTH, the firm would have lowered its price significantly when it submitted its BAFO. Thus, our recommendation simply places the firms in the position they

would have been in if DTH were not given misleading advice during discussions.

In addition, we have previously held that where the reopening of discussions is properly required, even though an offeror's price has been disclosed, reopening discussions is not precluded and does not constitute an improper auction. The possibility that a contract may not be awarded on the basis of fair and equal competition has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirement for competition takes priority over the regulatory prohibitions of auction techniques. National Draeger, Inc.--Recon., B-247919.7, Nov. 6, 1992, 92-2 CPD ¶ 325.

We also note that DTH cannot lower its proposed price by some arbitrary figure in an attempt to obtain the contract. Rather, it can only lower its price to the extent that its technical approach will allow, or it will risk a reduction in its technical score.

The request for reconsideration is denied.

Ronald Berger
for Robert P. Murphy
Acting General Counsel