



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

Decision

Matter of: Tucson Mobilephone, Inc.
File: B-255423.3
Date: June 27, 1994

DECISION

Tucson Mobilephone, Inc. protests the award of a contract under request for proposals (RFP) No. F41652-93-R-0161, issued by the Department of the Air Force for the maintenance of land mobile radios used at Dyess Air Force Base, Texas. Tucson contends that the agency improperly conducted discussions with two other offerors without holding discussions with the protester or requesting a best and final offer (BAFO) from the firm.

We dismiss the protest.

The RFP, issued on July 28, 1993, provided for award to the responsible offeror whose proposal was technically acceptable and offered the lowest overall price to the government. The solicitation also provided that award may be made on the basis of initial proposals, without discussions, and that therefore each initial proposal should contain the offeror's best terms from a cost or price and technical standpoint. The amended closing date for receipt of proposals was October 14.

Tucson filed a protest with our Office on October 14, prior to the closing time for the receipt of proposals, challenging certain terms of the RFP as restrictive and unreasonable. On November 15, the agency responded to the protest explaining the challenged solicitation provisions, but maintaining the propriety of the terms; the agency's report was received by the protester on November 18. The protester's December 3 comments in response to the report requested that the agency be directed to ask for BAFOs so all offerors could take into account in their offers any new information regarding the solicitation provided by the agency in its report's explanations in response to the protest. In response to Tucson's December 3 comments regarding the possible introduction of new solicitation information in the agency's November 15 report, the Air

Force--which did not believe any new solicitation requirements had been conveyed in the report--contacted by telephone the other offerors to verify receipt of the agency's protest report and to ask (prior to the evaluation of proposals) whether any information in that report would cause the offerors to have to change their proposals. Those offerors responded orally that nothing in the agency report's explanations regarding the solicitation's requirements presented new information creating a need to revise their proposals. On January 18, 1994, Tucson was notified that the contracting officer, after review of the proposals, did not believe it was necessary to request BAFOs.

On January 31, Tucson filed a second protest with our Office. Tucson's second protest challenged the agency's failure to provide all offerors an opportunity to submit a BAFO in response to any new information presented in the agency report submitted during its initial protest. (On February 3, Tucson withdrew its initial protest stating that "it can live with the clarification and representations of what is required by the solicitation.") The Air Force submitted a report responding to the second protest on February 16. In that report, the agency stated that it had contacted the other offerors to confirm whether the earlier report's explanations regarding the challenged RFP requirements added new RFP information giving rise to a need for offerors to have to revise their proposals, as Tucson had alleged in its comments during the initial protest.

By decision of April 14, 1994, we dismissed Tucson's January 31 protest of the failure to request BAFOs as untimely filed since the protest was filed more than 10 working days from the time Tucson learned its basis of protest. In that decision, we found that since Tucson knew on November 18 when it received the agency report in response to its initial protest that the Air Force firmly believed that the RFP was adequate and that an amendment was not necessary, the protester should have known at that time that the agency also did not intend to request BAFOs. We concluded that Tucson should have filed its protest of the agency report explanations having changed the terms of the RFP, and of the agency's failure to request BAFOs, by December 3--10 working days after its receipt of the report.

The protester filed the current (third) protest on February 23, while the firm's second protest was pending, based upon the agency's statement in its second protest report that the other offerors had been orally contacted about whether or not they thought the agency's explanations about the RFP's terms created a need for the offerors to revise the terms of their proposals. Tucson contends that the agency's inquiry to the other offerors constituted

discussions--namely, price negotiations--and that those offerors' responses (i.e., that the information did not create a need to change their offers) constituted the submission of BAFOs. Tucson contends that the contracting officer was required to hold similar discussions with the protester and allow Tucson to submit a BAFO revising its proposal in response to the agency's explanations of the RFP's requirements stated in the Air Force's November 15 report.

Where discussions are held with one offeror, the agency is required to conduct discussions with, and request BAFOs from, all other offerors whose proposals are in the competitive range. Federal Acquisition Regulation (FAR) §§ 15.610(b) and 15.611(a); 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936; B-251936.2, May 13, 1993, 93-1 CPD ¶ 420. Discussions are material communications related to an offeror's proposal and distinguishable from clarifications, which are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal. Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227. FAR § 15.601 defines "discussion" as follows:

". . . any oral or written communication between the [g]overnment and an offeror, (other than communications conducted for the purpose of minor clarification) whether or not initiated by the [g]overnment, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal."

Here, the agency contacted the other two offerors merely to verify whether any other offeror agreed with the protester's contention that the agency's report in response to Tucson's initial protest included new information about the RFP's requirements which required the submission of revised proposals. The inquiry clearly did not involve information essential for determining the acceptability of the proposals (in fact, the proposals had not yet been evaluated) and the offerors were not given an opportunity to revise or modify their proposals. See FAR § 15.601. While the protester argues that the offerors' responses that no proposal revisions were necessary constitutes BAFOs confirming initially offered prices, the agency at no time stated that any proposal changes would be permitted; the offerors' oral responses clearly were not understood by the offerors involved and the agency as a BAFO. The agency contacted the other offerors for the limited purpose of eliciting comments regarding the merit of Tucson's protest contention that new

solicitation information modified the RFP's requirements; this communication was initiated by the agency solely for informational purposes in response to the protest, was properly sought from interested parties to the protest and did not constitute discussions.

Accordingly, the agency was not required to conduct discussions with, or solicit a BAFO from, the protester since, contrary to Tucson's contentions, discussions were not held with, nor were BAFOs requested from, the other offerors. As permitted by the RFP, and FAR § 15.610(a), the agency was therefore permitted to make award on the basis of initial proposals.

The protest, as filed with our Office, does not establish a basis for challenging the agency's action and, accordingly, must be dismissed.



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