



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diverco, Inc.
File: B-259734
Date: April 21, 1995

Timothy E. Heffernan, Esq., and Charles E. Raley, Esq.,
Watt, Tieder & Hoffar, for the protester.
Jeffrey I. Kessler, Esq., and Richard A. Couch, Esq.,
Department of the Army, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

A reasonable possibility of prejudice so as to justify sustaining a protest concerning improper discussions is not established where the protester's proposal was significantly higher priced, with less advantageous delivery terms, than the selected contractor's, and the protester did not suggest, nor was it otherwise apparent from the record, that the protester could or would have lowered its price sufficiently to be in line for award if it had an opportunity to revise its initial proposal, even though prejudice was the sole focus why the agency asserted that the protest should be denied.

DECISION

Diverco, Inc. protests an award to Canadian Commercial Corporation (CCC)/Olympic Gear and Manufacturing Inc.¹ under request for proposals (RFP) No. DAAE07-94-R-J126 issued by the Department of the Army, Tank and Automotive Command, for transfer transmissions.

We deny the protest.

The RFP, issued on June 1, 1994, contemplated the award of a firm, fixed-price contract to the responsible offeror submitting the lowest-priced, technically acceptable proposal. The RFP generally required first article testing

¹Olympic, as a Canadian offeror under agreement between the governments of Canada and the United States, submitted its proposal through CCC which will subcontract 100 percent of the contract with Olympic.

(FAT)² and stated a "desired" delivery schedule of 90 days after award for FAT and of 240 to 300 days after award for the production items. The RFP expressly authorized offerors to propose alternative delivery schedules.³ The proposed length of delivery schedules was not a stated factor for award selection. The RFP incorporated by reference the provision for contract award at Federal Acquisition Regulation (FAR) § 52.215-16, "Alternate III (AUG 1991)," which states:

"The [g]overnment intends to evaluate proposals and award a contract without discussions with offerors. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the [g]overnment reserves the right to conduct discussions if later determined by the [c]ontracting [o]fficer to be necessary."

The Army received eight proposals by the due date of August 18. After the low-priced offeror was permitted to withdraw due to a mistake in its proposal, Olympic's proposal offered the lowest evaluated price of \$3.954 million with FAT. Diverco's proposal was fifth lowest of the remaining offers at \$4.728 million with FAT, or \$4.709 million if its request for waiver of FAT were granted.

Olympic proposed the "desired" delivery schedules for production items that was stated in the RFP (240 to 300 days). For FAT, Olympic's proposal stated that the delivery schedule was "to be arranged." Diverco proposed a delivery schedule of 210 days for FAT and 260 to 320 days for the production items.⁴

²The RFP permitted waiver of the FAT requirement for eligible offerors.

³For offerors receiving FAT waivers, the RFP stated an accelerated delivery schedule would be "required." The agency acknowledges that the RFP thus contained a defect on the face of the solicitation because it provided for possible unequal treatment of offerors. This apparent defect did not influence the evaluation of proposals for award in this instance and, in any event, it was not protested.

⁴Diverco also proposed alternate delivery schedules for production items in the event its request for waiver of FAT were granted.

On August 19, the Army contacted Olympic and stated that it must propose a specific delivery schedule for FAT. Olympic responded that same day with a proposed FAT delivery schedule of 120 days after award. The Army subsequently conducted a pre-award survey of Olympic and determined that Olympic was responsible to perform in accordance with the terms of its proposal. On October 31, the Army awarded the contract to Olympic.

Diverco protested to the Army that the communication with Olympic regarding its FAT delivery schedule constituted improper discussions with only one offeror. The Army conceded that discussions with Olympic had occurred, but denied Diverco's agency-level protest because Diverco was not prejudiced by the admittedly improper discussions. Diverco then protested with our Office.

We agree with the Army that Olympic's designation of its FAT delivery date after submission of initial proposals constituted discussions. See Astro-Med, Inc., B-232000, Nov. 21, 1988, 88-2 CPD ¶ 500. When discussions are held with one offeror, a contracting agency must hold discussions with all offerors whose proposals are within the competitive range and give them an opportunity to revise their proposals. FAR §§ 15.610, 15.611; Motorola, Inc., 66 Comp. Gen. 519 (1987), 87-1 CPD ¶ 604. Here, the Army alleges that Diverco was not prejudiced by the Army's actions of failing to conduct discussions with all competitive range offerors, and that Diverco's protest should therefore be denied.

Competitive prejudice is an essential element of every viable protest. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379. Where an agency violates procurement requirements, a reasonable possibility of prejudice is a sufficient basis for sustaining a protest and we will resolve any doubts concerning the prejudicial effect of the agency's action in favor of the protester. Foundation Health Fed. Servs., Inc.; QualMed, Inc., B-254397.4 et al., Dec. 20, 1993, 94-1 CPD ¶ 3; The Jonathan Corp.; Metro Mach. Corp., B-251698.3; B-251698.4, May 17, 1993, 93-2 CPD ¶ 174, aff'd, Moon Eng'g Co., Inc.--Recon., B-251698.6, Oct 19, 1993, 93-2 CPD ¶ 233. However, where no reasonable possibility of prejudice is shown or is otherwise evident from the record, our Office will not sustain a protest, even if a deficiency in the procurement is apparent. Colonial Storage Co.--Recon., B-253501.8, May 31, 1994, 94-1 CPD ¶ 335; MetaMetrics, Inc. B-248603.2, Oct. 30, 1992, 92-2 CPD ¶ 306. Where, as here, an impropriety in the conduct of discussions is found, it must be clear from the record that the protester was not prejudiced in order to

deny the protest. National Medical Staffing, B-259402; B-259402.2, Mar. 24, 1995, 95-1 CPD ¶ ___; Ashland Sales & Serv., Inc., B-255159, Feb. 14, 1994, 94-1 CPD ¶ 108.

Here, Diverco was the fifth highest-priced offeror with a significantly higher price than Olympic's.⁵ Diverco also proposed longer delivery schedules than those proposed by Olympic. The issue of prejudice was the sole focus of why the agency, both in the agency-level and GAO protests, asserted that Diverco's protest should be denied. However, the protester does not state, nor does the record otherwise show, that Diverco could or would have lowered its price sufficiently to be in line for award had discussions been conducted. Under the circumstances, we have no basis to conclude that there was any reasonable possibility that Diverco was prejudiced. See I.T. Corp., B-258636 et al., Feb. 10, 1995, 95-1 CPD ¶ 78; Colonial Storage Co.--Recon. supra; M.C. Dean Elec. Contracting, Inc., B-248835.2, Nov. 16, 1992, 92-2 CPD ¶ 346.

Diverco also challenges the Army's pre-award survey and resulting determination that Olympic is responsible. A determination that a bidder or offeror is capable of performing a contract is based, in large measure, on subjective judgments which generally are not susceptible to reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. No such showing has been made here.

The protest is denied.


for Robert P. Murphy
General Counsel

⁵Olympic's price is \$755,000 less than Diverco's lowest proposed price (with requested FAT waiver), i.e., 19 percent of Olympic's price.