

ATAS front



Comptroller General
of the United States

13118

Washington, D.C. 20548

Decision

Matter of: East Penn Manufacturing Co., Inc.

File: B-261046

Date: August 1, 1995

Merritt Lee Murry, Esq., Slocum, Boddie & Murry, for the protester.
Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of alleged improprieties in request for proposals filed after the closing time for submission of offers is untimely.
2. Where contracting agency determines the protester's total price to be realistic, it need only advise the protester of its right to revise its price when submitting its best and final offer; the fact that the protester's price was not low is not a basis for discussions.
3. Award to low-priced, technically superior offeror is proper where record shows that evaluation was reasonable and there is no support for protester's contention that agency improperly downgraded protester's proposal for failure to follow the proposal format required by the solicitation.

DECISION

East Penn Manufacturing Co., Inc. protests the award to the Exide Corporation under request for proposals (RFP) No. SP0410-94-R-3572, issued by the Defense General Supply Center, Defense Logistics Agency. East Penn objects to the RFP and asserts that the selection decision was flawed.

We deny the protest.

The RFP, issued September 2, 1994, required the submission of prices for batteries for a base year period and four 1-year options. Offerors were to submit proposals in four separate volumes. The first volume was to consist of the executed and signed proposal, an executive summary of the

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entire proposal, and an appropriate subcontracting plan. The remaining three volumes were to address contract performance, contract management, and the cost/price of performing the contract. The RFP provided details for the content and format of the proposals and stated that the use of the proper format was extremely important to proposal evaluators and the review process.

Award was to be made to the firm whose proposal was most advantageous based upon the evaluation of the performance, management, and cost/price portions of each offeror's proposal. The RFP stated that performance and management factors were equal in weight and significantly outweighed cost/price.

After the pre-proposal conference, the RFP was amended on October 21. The amendment, among other things, provided the estimated total annual requirements for the first contract year by battery type based on the "government's usage and demand during a prior twelve-month period." The amendment also responded to concerns raised during the pre-proposal conference regarding economic price adjustments, fluctuating lead prices and the associated pricing risks, the extent of the government's ability to specify quantities and locations for each battery type, and the frequency of service required.

Three firms--East Penn, Exide, and Interstate Battery Systems of America--submitted offers by the November 15 closing date. Each offer was evaluated by two teams: the performance and management team evaluated the performance and management proposals, and the business team evaluated the cost/price proposals and the executive summaries. Lists of deficiency reports (DRs) and clarification requests (CRs) were developed for each offer. By letter of December 16, the contracting officer forwarded to each offeror the applicable DRs and informed each offeror of the date for oral discussions. Subsequent to the oral discussions, offerors were advised to submit written responses to the DRs by January 10, 1995. Each offeror submitted timely responses. These responses were then evaluated by the two evaluation teams. On March 10, the contracting officer, based upon the evaluations of each revised proposal, sent CRs to each offeror and established March 16 as the deadline for the submission of best and final offers (BAFOs). Timely BAFOs were submitted.

Based on the BAFOs, the evaluators concluded that Exide had submitted the highest rated performance-management proposal (highly acceptable with low risk versus East Penn's rating of acceptable with moderate risk) and the lowest overall

price.¹ The contracting officer then prepared a memorandum for the source selection authority (SSA) summarizing the results of the evaluations and recommending award to Exide. The SSA concurred with the recommendation, and award was made to Exide on March 31.

East Penn objects to the RFP on various grounds. It contends that insufficient information was provided to adequately develop proposals, that the RFP should not have been issued because it may infringe upon East Penn's existing battery contract with the Department of the Army, and that the RFP pricing approach will result in a higher cost to the government than is necessary. These protest bases are untimely and will not be considered on the merits. Our Bid Protest Regulations require that protests based upon alleged improprieties in a RFP which are apparent prior to the closing time for receipt of initial proposals must be filed prior to the closing time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1995). East Penn did not protest the allegedly defective RFP prior to the closing time.

East Penn also contends that the agency did not provide sufficient time to submit proposal revisions. Alleged improprieties which do not exist in the initial solicitation which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following incorporation. 4 C.F.R. § 21.2(a)(1). Because East Penn's protest of this issue was not filed until after contract award, it is untimely.

East Penn also argues that it was not advised during discussions that its price was high. For discussions to be meaningful, an agency must advise each offeror in the competitive range of weaknesses, excesses, or deficiencies in its proposal, correction of which would be necessary for the offeror to have a reasonable chance of being selected for award. tg Bauer Assocs., Inc., B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549. This does not mean that agencies must afford offerors all-encompassing discussions or to discuss every element of a technically acceptable proposal that received less than the maximum possible score. Benchmark Sec., Inc., B-247655.2, Feb. 4, 1993, 93-1 CPD ¶ 133. Thus, an agency has no responsibility to tell an offeror that its price is too high unless the government has reason to think that the price is unreasonable. Marwais Steel Co., B-254242.2; B-254242.3, May 3, 1994, 94-1 CPD ¶ 291. During

¹After evaluation of BAFOs, the proposal of the third offeror, Interstate, was rejected as unacceptable because its product failed part of the required qualification testing and would need retesting.

discussions, the agency here advised East Penn of components of its total price that appeared either too high or too low. Since at the time BAFOs were requested, the agency considered East Penn's total price to be realistic, we think there was no need to advise East Penn further regarding its price. We also note that, contrary to East Penn's assertions, the letter to the protester requesting submission of a BAFO did advise East Penn that it could submit a revised price as part of its BAFO. We conclude that the discussions with East Penn were unobjectionable.

Finally, East Penn argues that its proposal was improperly downgraded by the evaluators because it failed to follow the proposal format required by the RFP. There is nothing in the record which supports East Penn's contention; rather, the record shows that the evaluators fully considered both proposals and reasonably concluded that Exide's was superior. Specifically, the record shows that Exide was rated highly acceptable with low risk in the performance and management areas; East Penn was rated acceptable with moderate risk in performance and management. Exide received a high rating for having an established nationwide manufacturing, transportation, and distribution network, a comprehensive quality control program, a program team solely devoted to the contract, and several manufacturing plants and one back-up plant. In contrast, East Penn's proposal was found only to meet minimum requirements and its proposal indicated that it would likely require greater contractor and government coordination. For example, it did not have an established nationwide distribution center, but needed to rely on some subcontractors. Further, the evaluators found that its quality control program was not as comprehensive as Exide's program. Given that Exide was low priced and reasonably found technically superior, we conclude that the selection of Exide as providing the most advantageous offer was reasonable. Further, while the record shows that the evaluators expressed concern that East Penn's failure to follow the RFP format instructions reflected on East Penn's capabilities, we see no basis to conclude that East Penn's proposal was improperly downgraded for failure to use the format required by the RFP.

East Penn apparently believes that because both Exide and East Penn promised to comply with RFP requirements there can be no reason for scoring their proposals differently. However, proposals were scored not on the offeror's promise to comply with RFP requirements, but on the manner in which the offeror proposed to provide the required supplies and services (performance) and the offeror's ability to perform

the required work (management). The record shows that the agency reasonably concluded that Exide offered the technically superior proposal.

The protest is denied.

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for Robert P. Murphy
General Counsel