



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Robotic Systems Technology

File: B-271760

Date: May 14, 1996

Donald J. Walsh, Esq., Scaldara & Potler, for the protester.

James J. McCullough, Esq., Joel R. Feidelman, Esq., and Catherine E. Pollack, Esq.,
Fried, Frank, Harris, Shriver & Jacobson, for Minowitz Manufacturing Company, the
intervenor.

Capt. David P. Harney, Department of the Army, for the agency.

Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

The protester is not an interested party eligible to challenge the award of a contract where the protester during negotiations withdrew its proposed pricing with a promise to perform the contract at pricing to be provided in its best and final offer (BAFO) and the protester did not submit a BAFO or to otherwise confirm its earlier offer by the date and time specified for receipt of BAFOs.

DECISION

Robotic Systems Technology protests the award of a contract to Minowitz Manufacturing Company under request for proposals (RFP) No. DAAE20-95-R-0251, issued by the Department of the Army for smoke generator sets.

We dismiss the protest because Robotic is not an interested party to challenge the award to Minowitz.

The RFP provided for the award of a fixed-price contract on a best value basis. Technical and cost proposals were requested. The Army received proposals from three offerors, including Robotic and Minowitz, by the December 11, 1995, closing date for receipt of proposals. All three offerors were included in the competitive range and received discussions. In response to discussions, Robotic modified its initial proposal on January 19, 1996, to substantially lower its proposed price. Thereafter, by amendments 0003 and 0004 to the RFP, the Army modified the solicitation's scope of work. On February 26, the Army directed offerors to agree to

the terms of the RFP, as amended, and "at the prices that will be set forth in your [BAFO]." Robotic responded on the same date by informing the Army that:

"Robotic . . . agrees to furnish and deliver all items or perform all the services set forth or otherwise identified in the subject solicitation and amendments 0001 through 0004 for the prices that will be set forth in our [BAFO]."

On February 27, the Army requested, by amendment 0005, that BAFOs be submitted by February 29. Offerors were cautioned that "offerors who do not intend to modify their original offer, but who do want to be considered for award, must confirm their offers by responding to this request for [BAFOs] to remain in consideration for award."

Robotic did not submit a BAFO or confirm its offer by the February 29 closing date for receipt of BAFOs. The contracting officer contacted Robotic on March 1 and discovered that Robotic mistakenly had failed to file a BAFO or confirmation. On March 1 after the contracting officer's call, the agency received a statement from Robotic that the protester did not intend to submit a BAFO but wished to have its January 19 revised offer considered for award. On March 4, Robotic submitted another statement proposing an \$89,804 reduction in its proposed price due to "further material reductions in price from our vendors."

After receipt of Robotic's March 4 offer, the contracting officer directed that all BAFOs, including Robotic's March 4 offer, be evaluated to determine "whether it was clearly in the government's best interests to reopen discussions and allow [Robotic] to submit a timely BAFO." Because the remaining offerors had submitted timely, technically acceptable, and reasonably priced BAFOs, the contracting officer determined that reopening discussions was not in the government's best interest. Contract award was made to Minowitz on March 29.

Robotic protests the evaluation of its and Minowitz's proposals, the content of discussions, and the selection of Minowitz's higher-priced proposal. The Army and Minowitz respond that Robotic is not an interested party to protest the award to Minowitz because Robotic, in response to discussions from the agency and prior to the date for BAFOs, revoked its offer and then failed to either timely submit a BAFO for consideration or confirm its earlier offer.

Robotic replies that its March 1 confirmation of its January 19 offer was timely because the agency's request for BAFOs did not state a date by which confirmation of offers must be received; in Robotic's view, confirmation of an existing offer could be submitted at any time up to award. Robotic also argues that its March 1 confirmation of its revised offer is acceptable under the authority of Federal Acquisition Regulation (FAR) § 52.215-10, which was incorporated in the RFP and

which permits the government to consider a late modification of any otherwise successful proposal. Finally, Robotic argues that the agency's actions after receipt of its March 1 confirmation of its revised offer waived the government's right to assert that Robotic's confirmation was untimely.

First, we disagree with Robotic that the RFP did not state a date by which an offeror's confirmation of its offer must be submitted under the agency's request for BAFOs. Amendment 0005 plainly stated that its purpose was to close discussions and request BAFOs; offerors were informed that negotiations would close and BAFOs were due February 29, 1996, and that "offerors who do not intend to modify their original offer, but who do want to be considered for award, must confirm their offers by responding to this request for [BAFOs] to remain in consideration for award." This amendment is in accord with FAR § 15.611, which mandates a "common cutoff date and time" for the closure of discussions and receipt of BAFOs; after receipt of BAFOs contracting agencies are admonished by FAR § 15.611(c) to reopen discussions only where it is clearly in the government's interests to do so. The only reasonable interpretation of amendment 0005 is that an offeror's confirmation of its offer must be received by the date and time specified for receipt of BAFOs; any other interpretation would be inconsistent with FAR § 15.611.

We also disagree with Robotic's apparent belief that the protester had an existing offer which the Army could accept at the time of the agency's request for BAFOs. As noted above, on February 26, Robotic, as well as the other offerors, acknowledged RFP amendments 0003 and 0004, and agreed to perform all the amended services "for the prices that will be set forth in our [BAFO]." This communication (which admittedly is in the form requested by the Army) revoked Robotic's earlier January 19 offer because it withdrew Robotic's promise to perform the contract services for the fixed-prices stated in its January 19 offer. When Robotic withdrew its promise to perform the contract for the fixed-prices stated in its January 19 offer, that offer could no longer be accepted by the agency. See Sonshine Enters., B-246268, Feb. 26, 1992, 92-1 CPD ¶ 232.

Robotic argues, however, that the Army could consider the protester's late confirmation of its offer pursuant to the standard "Late Submission, Modifications, and Withdrawal of Proposals" clause, FAR § 52.215-10, which was incorporated in the RFP. FAR § 52.215-10(g), permits the government to consider a late modification of an "otherwise successful proposal" that makes it terms more favorable to the government. The term "otherwise successful" means that the government may accept a favorable late modification only from the offeror already in line for contract award. Environmental Control Div., Inc., B-255181, Feb. 16, 1994, 94-1 CPD ¶ 115. As noted above, Robotic did not have an offer before the Army which the agency could accept; thus, the protester's late submission could not be considered as modifying an "otherwise successful proposal" that would allow the agency to consider the late submission.

Robotic also argues that the Army's evaluation and consideration of its late confirmation of its offer and later offer to reduce its offer price, as well as the agency's failure to promptly notify Robotic that its proposal confirmation was considered late, essentially waived the agency's right to assert that Robotic's proposal confirmation was late. We disagree. As explained above, because Robotic's proposal confirmation was untimely submitted, there was not a fixed-price offer before the Army which the agency could accept. Accordingly, Robotic's proposal was properly rejected. The agency's post-submission actions do not operate to waive Robotic's error or to estop the agency from rejecting Robotic's late offer. See Brookfield Dev., Inc.; Fuller and Co., and Colorado National Bank, B-255944, Apr. 21, 1994, 94-1 CPD ¶ 273.

Robotic finally argues that its untimely submission of its proposal confirmation was waivable as a minor informality. However, price is a material requirement in all negotiated procurements, and the failure to submit required pricing information concerns a material solicitation requirement and cannot be viewed as a minor informality. 10 U.S.C. § 2305(b) (1994); Technical Micronics Control, Inc., B-206843, Sept. 13, 1982, 82-2 CPD ¶ 221.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1996). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261 (1988), 88-1 CPD ¶ 151. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

Because, as explained above, Robotic's proposal was properly rejected, the protester would not be in line for award even if its protest were sustained. Accordingly, Robotic is not an interested party eligible to object to the technical evaluation of its and Minowitz's proposal, the content of discussions, and award to Minowitz.

The protest is dismissed.

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