DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-186031 DATE: June 16, 1976

MATTER OF: James R. Parks Co.

DIGEST:

1. Protest by unsuccessful offeror against affirmative determination of successful offeror's responsibility, will not be considered since our Office does not review affirmative determinations of responsibility except where fraud is alleged or where definitive responsibility criteria allegedly have not been applied.

2. Omission by agency of Pre-Award Survey of successful offeror from administrative report sent to protester was not improper, since ASPR § 1-907 (1975 ed.) precludes release of information obtained in such surveys to anyone other than companies surveyed.

3. Where offeror submitted letter with offer proposing lower unit price if economic price adjustment clause would be included in contract, on which basis amendment was issued to include such clause, thereby affording all offerors opportunity to revise proposals, meaningful "discussions" must be considered to have been held and award cannot be said to have been made on initial proposal basis.

4. Award of contract without formal specific request for "best and final" offers was not abuse of discretion or violative of competitive negotiation procedures to cause such award to be considered improper since, under particular circumstances, intent and effect of amendment was to request "best and final" offers.

5. Protester has burden of affirmatively proving its case, and burden is not met where conflicting statements of protester and contracting agency constitute only evidence.

6. Concerning unsuccessful offeror's complaint that it was not notified that award was to be made, ASPR § 3-508.2(b) (1975 ed.) does not require such notice to unsuccessful offerors where, as here, contracting officer has placed in contract file written determination that contract must be awarded without delay to protect public interest.

7. Allegation that successful offeror "did not adequately document and certify his costs" under economic price adjustment clause has no basis, since firm price was offered, and subject clause was therefore deleted from contract awarded.

Request for proposals (RFP) No. DAAA09-76-R-6229 was issued as a small business set-aside on September 2, 1975, by the United States Army Armament Command, Rock Island, Illinois, requesting offers to furnish 3,287 machine gun mounts. Proposals were to be received by October 1. Amendment 0001, issued on September 10, added certain technical data and extended the closing date for the receipt of proposals to October 24. Twelve offers were received and opened on that date. The low offeror was Peterson Machine Products Corp. (Peterson) with a unit price of $244.82. The second low offeror, James R. Parks Co. (Parks), at $254.26 per unit, submitted with its offer a letter proposing an alternate unit price of $233.40 if an economic price adjustment clause would be included in the contract. On the basis of such letter, and to obtain the best possible price for the Government, amendment 0002 was issued on December 3 to include an economic price adjustment clause and to establish January 2, 1976, as a new closing date for a receipt of proposals.

When revised proposals were examined, Peterson remained low, maintaining its initial offered price of $244.82 per unit. Parks, although again the second low offeror, had increased its offer to $265.55 per unit. By letter dated January 28, Peterson advised the contracting officer that its price was firm and that it would not require an economic price adjustment. After a favorable preaward survey, contract DAAA09-76-C-6451 was awarded to Peterson on March 4 without an economic price adjustment clause.

By telegram of protest dated March 5, and by letter dated April 27 commenting on the Army report responsive to the protest, Parks alleges the following: (1) Peterson is not a financially sound firm; (2) the preaward survey was neither thorough nor accurate; (3) Peterson was awarded the subject contract despite past unsatisfactory performance; (4) Peterson's performance as a subcontractor currently in production of an item identical to that being procured should not "pre-qualify"

Peterson as being technically capable of producing the item; (5) the Army's preaward survey of Peterson was improperly omitted from the administrative report sent to Parks; (6) although after consultation with "* * * responsible parties both at Rock Island and SBA * * *" in regard to procedure concerning ambiguities in specifications which were perceived by Parks after receipt of amendment 0002, Parks was advised that "* * * since it was a 'negotiated' proposal to make provisions for the superfluous cost and that they could be 'negotiated out' in the course of negotiations," no negotiations were conducted; (7) award was made "* * * without the extension to the protester of a 'Best and final offer letter,' to allow * * * final resolution of pricing, * * *"; (8) Parks was not notified that award was to be made; and (9) Peterson did not "* * * adequately document and certify his costs under this [economic price adjustment] clause * * *."

Allegations (1)-(4) concern issues of responsibility. See Armed Services Procurement Regulation (ASPR) § § 1-902, 1-903 (1975 ed.). Here, the appropriate contracting officials have determined Peterson to be responsible. This Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Although we will consider protests against determinations of nonresponsibility to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform.

Concerning allegation (5), ASPR § 1-907 (1975 ed.) precludes the release of information obtained in a preaward survey to anyone other than the company surveyed.

In response to allegations (6) and (7), the Army states that, because of the existence of adequate competition, award was made on the basis of initial proposals pursuant to ASPR § 3-805.1(a)(v) (1975 ed.). That regulation provides an exception to the requirement that written or oral discussions shall be conducted with all responsible offerors whose proposals are within a competitive range in the following situation:

> "in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price, provided however that the solicitation notified all offerors of the possibility that award might be made without discussion, and provided that such award is in fact made without any written or oral discussion with any offeror."

As noted above, the contracting officer determined that there was sufficient competition to insure that a fair and reasonable price would result from the acceptance of the most favorable initial proposal without discussion. Moreover, offerors were cautioned by paragraph 10(g) of the Solicitation Instructions and Conditions, Standard Form 33A, that discussions might not be held, as follows:

> "The Government may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government."

However, under the particular circumstances of this case, it must be considered that "discussions" were in fact held, and award could not therefore be said to have been made on an initial offer basis. We have held that a determination whether certain actions constitute "discussions" depends on whether an offeror has been afforded an opportunity to revise or modify its proposal. 51 Comp. Gen. 479, 481 (1972). Here, Parks' offer of a price reduction if an economic price adjustment clause would be included in the contract, and the subsequent inclusion of such clause by issuance of amendment 0002, provided Parks and all other offerors with the opportunity to change their proposals, and thus constituted "discussions." See 50 Comp. Gen. 246, 251 (1970). Moreover, since Parks' letter prompted the contracting officer to consider including the subject clause, and since all offerors were afforded equitable treatment by issuance of the amendment, the "discussions" were meaningful. See B-173677(1), May 31, 1972.

In similar circumstances, we have stated that an amendment may be considered deficient if it does not specifically request offerors to submit their "best and final" offers reflecting the matter contained in the amendment. See 50 Comp. Gen. 246, 251 (1970); ASPR § 3-805.3(d) (1975 ed.). However, we cannot conclude that, under the circumstances

of this case, award on the basis of the new proposals without a formal and specific request for "best and final" offers was an abuse of discretion or violative of competitive negotiation procedures to cause such award to be considered improper. We note in this regard that page 1 of amendment 0002 contained the following language: "The hour and date specified for receipt of offers is extended to: 76 Jan 02, 3:45 P.M. Central Time" (emphasis added). In view of such language giving notice of a cut-off date for "receipt of offers," and since each offeror had an equitable opportunity to submit a new proposal in response to the amendment (see ASPR § 3-805.1(b) (1975 ed.)), we believe that the intent and effect of amendment 0002 was to request "best and final" offers. Moreover, Parks in fact increased its offered price per unit rather than decreasing it as it stated in the letter it submitted with its initial proposal would be the case if an economic price adjustment clause were included (which statement prompted issuance of amendment 0002 adding such clause). Cf. B-177758, July 13, 1973. In this connection, the Army's position concerning Parks' allegation that it increased its offered price per unit on the basis of the advice of "the technical section" of the Rock Island Arsenal and of the Small Business Administration is that there is no record or recollection of any discussions with representatives of the protester on the subject at the procurement office, the United States Army Armament Command, or the Rock Island Arsenal technical support activities. Neither is there any evidence that Parks communicated with the contract specialist named on page one of the solicitation. A protester has the burden of affirmatively proving its case, and since conflicting statements by Parks and the contracting agency constitute the only evidence concerning the matter, such burden has not been met. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976. Further, we do not believe that Parks' reliance on general procedural information from the SBA, receipt of which is not documented, can be considered either proper if in fact done, or prejudicial to a particular solicitation.

In regard to Parks' complaint that it was not notified that award was to be made (allegation (8)), ASPR § 3-508.2(b) (1975 ed.) provides that the requirement that unsuccessful offerors be informed by written notice of the name and location of the apparently successful offeror shall not apply "* * * to any procurement action which the contracting officer determines in writing must be awarded without delay to protect the public interest.* * *" Since the contract file contains such a determination by the contracting officer, the Army's failure to notify

Parks that Peterson was the successful offeror until after award was made was not improper.

Finally, concerning Parks' allegation that Peterson "* * * did not adequately document and certify his costs under * * * [the economic price adjustment] clause, * * *" (allegation (9)), as already noted Peterson informed the procuring activity by letter dated January 28 as follows: "Our price for the bid quantity is a firm price; we do not require economic price adjustment for labor and material." The economic price adjustment clause was therefore removed from the contract awarded to Peterson. Accordingly, there is no basis for Parks' concern regarding that matter.

In view of the above, the protest is denied.

Deputy Comptroller General
of the United States