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DECISION

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

FILE: B-194119 DATE: September 14, 1979

MATTER OF: C-E Air Preheater Co., Inc.

DLG 2749

DIGEST:

1. Protest of subcontract award by Government prime cost-type construction services and construction management contractor is properly for GAO consideration where, as here, award is "for" the Government.

2. Record indicates that prime contractor made protester aware that acceptance, without exception, of certain terms and conditions in the Request for Proposals was required in order to qualify for award. Furthermore, the language and timing of prime contractor's request for firm and final offer placed protester on notice that negotiations were concluded and final offer submitted could not be further modified.

3. Protester was not prejudiced by award on basis of relaxed requirements because it had been removed from competitive range and rejected as unacceptable for reasons unrelated to relaxed requirements.

C-E Air Preheater Company, Inc. (C-E) protests the award to Carborundum Company of a contract for the fabrication and delivery of air emission control equipment by J. A. Jones Construction Company (Jones) under Jones Request for Proposals (RFP) No. 27920. Jones is a prime cost-type construction services and construction management contractor for the Department of Energy (DOE).

Although, as a matter of policy, our Office generally will not consider protests of subcontract awards by prime contractors, we will consider protests where, as here, the subcontract award is "for" the Government. Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. We are not aware of a previous case in which we reviewed a subcontract award by a cost-type construction services and construction management prime contractor. However, the circumstances here are similar to those where

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a subcontract is awarded by a DOE prime facilities management contractor. We view such awards as "for" the Government. See, e.g., Cohu, Inc., 57 Comp. Gen. 759 (1978), 78-2 CPD 175. Furthermore, DOE believes that C-E's protest is properly for our review.

C-E alleges that errors by Jones in the negotiation process prevented it from receiving award of this contract. For the reasons discussed below, we find the allegations to be without merit and the protest is denied.

BACKGROUND

Jones released its RFP to 15 firms and after receipt and review of proposals, initially limited the competitive range for negotiations to C-E and Carborundum, both of whom took exceptions to certain technical specifications and contractual terms and conditions contained in the RFP. All exceptions to the specifications were resolved during negotiations. The resolution of exceptions taken to the contractual terms and conditions is the crux of this protest.

Throughout the negotiations, C-E took substantial exceptions (to the point of complete deletion in some instances) to the following clauses: Warranty, Inspection, Default, Delays by Buyer, and Federal, State and Local Taxes. The record of negotiations shows that on several occasions, Jones advised C-E that these exceptions were "unacceptable." Although Jones did indicate its amenability to a revision of the Warranty clause to provide for a time limit to seller's liability, Jones specifically stated that the Default and Inspection clauses "could not be changed and must remain as written." Affidavits submitted by C-E appear to indicate that it was aware that Jones would not accept C-E's requested exceptions to certain terms and conditions.

In response to a Jones request for "firm and final" offers, C-E proposed a modified Warranty clause as suggested by Jones, but continued to take substantial exceptions to other terms, including modification of

the Inspection clause and deletion of the Default clause. On the other hand, Carborundum's final offer included an acceptably modified Warranty clause similar to that offered by C-E and only one other minor exception to the terms of a payment provision which reduced, from 30 to 15 days after receipt of final shipment, the time period in which Jones was to make 90 percent of contract payment. C-E offered a final maximum price of $1,432,319.00, slightly lower than Carborundum's price of $1,436,251.00.

After review of the final offers, Jones determined C-E's proposal to be unacceptable. Notwithstanding the minor exceptions, Jones found Carborundum's offer acceptable and sought approval from DOE to make award noting the following in its request:

> "Based on the [negotiations] and in consideration of the schedule restraints [to allow DOE to meet a schedule for compliance with the Clean Air Act] it was concluded that additional negotiations [with C-E] would fail to produce any further meaningful results. We conclude therefore, that we have achieved the lowest price with Carborundum Company and the most acceptable contractual terms obtainable." (Emphasis added).

With regard to contractual terms, Jones specifically referred to C-E's adamant position throughout negotiations and in its final offer that the Default clause be deleted. Jones concluded that in the best interest of Jones and DOE "the right of reprocurement under a default situation must remain intact." DOE approved the Jones request and award was made to Carborundum.

DISCUSSION

In commenting on the Jones/DOE response to its initial protest submissions, C-E limited the scope of its protest to three "key allegations" which we discuss below.

> Allegation #1: Jones failed to properly advise C-E that its proposal would not be considered further for award unless revisions were made.

The Jones request for a "firm and final" offer included the following language:

> "* * * We request that you review your proposal in its entirety and confirm a firm and final offer to our office by noon, Pacific Standard Time, December 1, 1978.
>
> "Your final offer should consider the following * * *."

C-E challenges the finality of the Jones request because it did not include a statement such as "C-E must accept certain terms or C-E's proposal shall be nonresponsive." Furthermore, C-E asserts that it construed the words "offer" and "consider", contained in the request, as indicating that Jones was merely asking C-E to entertain concepts and propose contract terms to Jones which would then be negotiated further.

We are not persuaded by these arguments. In our view, the plain meaning of the word "final" is determinative of this issue. Webster's Third New International Dictionary (1971) defines "final" as "not to be altered or undone" and "not to be done again." Moreover, we believe that the request for receipt of final offers by noon, Friday, December 1, which was the last working day prior to the RFP-announced target award date of December 4, was further indication that negotiations had concluded.

In light of the plain meaning of the language of the request and the timing of its issuance, we believe the Jones request for a firm and final offer properly notified C-E and Carborundum of Jones' intention to conclude negotiations and that any offer made by C-E or Carborundum would be a final submission. We have held that even a request for firm and final offer, which does not comply with all of the specifics of applicable procurement regulations, is sufficient if it has the "intent and effect" of concluding negotiations. At the very least, the instant request satisfies this standard. James R. Parks Co., B-186031, June 16, 1976, 76-1 CPD 384.

Allegation #2: Jones knew at all times that it had no intention to negotiate certain terms and conditions of the RFP, but caused C-E to believe just the opposite - that all terms were negotiable.

In alleging this error, C-E draws a distinction between "unacceptable" and "mandatory" terms asserting that the latter is the only type which is non-negotiable. Since Jones never described any of its terms as being "mandatory," C-E argues that all terms were, in fact, negotiable. C-E notes that at one point in the negotiations, Jones stated that any changes to the Warranty clause would be "unacceptable," but ultimately allowed one change, a time limit on the seller's liability. This, C-E claims, led it to believe that all exceptions to other clauses, such as Inspection or Default, which Jones also categorized as "unacceptable," were negotiable.

Whether a particular clause was or was not "mandatory" is irrelevant because even a necessary but non-mandatory clause may be non-negotiable if all competitors are aware of its non-negotiability. The important question here is whether C-E was aware or reasonably should have been aware that acceptance of certain terms and conditions as written was required by Jones in order to qualify for award.

Based on our review of the record, including affidavits from negotiators of Jones and C-E, we find that Jones reasonably did convey to C-E the non-negotiable nature of certain terms and conditions. While it is true that Jones once characterized changes to the Warranty clause as being unacceptable, and later informed all competitors that certain modifications to that clause would in fact be allowed, this change of position regarding the negotiability of one clause had no effect on the non-negotiability of certain other clauses which Jones continued to clearly state were acceptable only as written. An example of this is the Default clause, Article 12b. In addition to calling the C-E exception

to the clause "unacceptable," Jones informed C-E that "Article 12b could not be changed and must remain as written." The fact that C-E was aware of the Jones position with regard to any exceptions to the Default clause is clearly indicated in the notes of the C-E negotiator which state: "[Jones c]an't accept 12b exception." Yet, C-E continued to condition its offer on the deletion of Article 12b.

Finally, the Jones request for a firm and final offer once again instructed C-E to delete its "requested changes to J. A. Jones Terms and Conditions." We feel that this, coupled with the earlier discussions during negotiations clearly informed C-E that its offer would be unacceptable unless it agreed to accept certain RFP terms as written.

> Allegation #3: Jones negotiated further with Carborundum after receipt of firm and final offers and C-E never had the opportunity to match the terms and conditions as finally agreed to by Carborundum and Jones.

As noted earlier, Carborundum's response to the Jones request for a firm and final offer included a modified Warranty clause and an exception to the payment provision. As such, C-E maintains that Carborundum's offer, like its own, was not an unqualified acceptance of the Jones terms, but rather a "counter-offer" requiring further negotiations to make it acceptable and that C-E also should have been provided another opportunity to negotiate.

The C-E allegation that Jones conducted additional oral or written negotiations with Carborundum after receipt of firm and final offers is denied by Jones and DOE. It is apparent, however, that Jones found the two exceptions in Carborundum's final offer to be acceptable and incorporated them into the award document. In effect, Jones relaxed its requirements when it awarded to Carborundum notwithstanding qualifications to the Warranty and payment provisions.

However, we find no merit to C-E's argument that Jones should have negotiated further with C-E. The record indicates that C-E was afforded ample opportunity to

submit an acceptable proposal. Jones informed C-E several times during negotiations in addition to the request for firm and final offers that certain exceptions to the terms and conditions were unacceptable. As such, meaningful discussions had taken place and it was reasonable for Jones to conclude, as it did, that additional negotiations with C-E would fail to produce any meaningful results and that, in effect, C-E was no longer in the competitive range. Once C-E properly was excluded from the competitive range, no further discussions between Jones and C-E were required. Systems Consultants, Inc., B-187745, August 9, 1977, 77-2 CPD 153; 52 Comp. Gen. 198 (1972).

Although C-E argues that it was prejudiced because it was not allowed to match the terms of Carborundum's Warranty clause, this argument is without merit because C-E did in fact propose a Warranty clause with similar modifications which Jones and DOE found to be acceptable. In any event, the Jones determination of C-E's unacceptability and removal of the firm from the competitive range was not based on the exceptions C-E had taken to the Warranty clause. Moreover, we cannot conclude that Carborundum's payment provision exception, which merely reduced the time period in which Jones was to make 90 percent of contract payment, was such a significant deviation from the terms of the RFP as to require re-establishment of the competitive range and additional negotiation with the protester. Cf Computek Incorporated, et al., 54 Comp. Gen. 1080 (1975), 75-1 CPD 384. Since only Carborundum remained in the competitive range, no further negotiations with C-E were required. Systems Consultants, Inc., supra.

The protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States