

DECISION



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

12073

W. W. Wetherington
Proc. J.

FILE: B-195091

DATE: November 20, 1979

MATTER OF: John Fluke Manufacturing Company, Inc. ^{CNG01259}

[Protest of Army Contract Award]
DIGEST:

1. Request for and submission of information essential to determining acceptability of offer constituted discussions. Since agency improperly held discussions with only one of two offerors after close of negotiations, recommendation is made that, in future procurements, proper negotiation practices be followed.
2. Agency interpretation that clause stating that item from listed vendor has been approved by USAARRADCOM and requiring prior testing and approval of item when procured from non-approved source may be satisfied by submission of test data and information concerning performance on previous contracts is not unreasonable.

DLG 03782 John Fluke Manufacturing Company, Inc. (Fluke),
 DLG 03383 has protested the award of a contract for multimeters
 to Ballantine Laboratories, Inc. (Ballantine), under
 RFP No. DAAA09-79-R-4250, issued by the U.S. Army
Armament Materiel Readiness Command, Rock Island,
Illinois (ARRCOM).

Fluke contends:

"(1) That the multimeter offered by Ballantine in its 'best and final offer' was not in compliance with the objectively measurable performance requirements of the applicable specifications;

"(2) That the Ballantine multimeter was never tested as required by the specifications; and

007839 110890

"(3) That the Army conducted unilateral negotiations with Ballantine subsequent to the submission of best and final offers."

For the following reasons Fluke's protest is sustained.

Background

The RFP contained Army Part Drawing No. 11744661, which provides that:

DL603384
"The item described on the drawing, when procured from the vendor listed, is approved by the U.S. Army Armament Research and Development Command (USAARRADCOM)."

A substitute item shall not be used without prior testing and approval. (Emphasis added.)"

The listed vendor was Fluke.

Proposals were received from Fluke and Ballantine. Fluke offered its approved model; Ballantine offered its Model 3028A MOD 165. Ballantine's offer included a price per unit and the Model 3028A Instruction Manual, describing the features and performance characteristics of the offered unit.

Several amendments and reopenings, not at issue here, culminated in a second round of best and final offers received on March 23, 1979. Prior to this, ARRCOM determined that Ballantine's multimeter, as offered, did not satisfy all of the relevant specifications. On February 19, 1979, Ballantine was orally advised of this fact, and was asked to withdraw its offer. Ballantine orally refused, and stated that it would modify its multimeter to meet all of the requirements. In its second best and final offer Ballantine lowered its price, but did not provide information concerning how it would modify its multimeter to meet the specifications. Ballantine specifically stated that its original offer was unchanged.

At this point there was some internal dispute at ARRCOM over whom the contract should be awarded to, and there was a protest to ARRCOM by Ballantine against the cancellation of a scheduled preaward survey of its facilities. ARRCOM decided to "give Ballantine an equal chance to prove its product can comply to specifications," and on April 12, 1979, requested data from Ballantine showing that its multimeter would comply with all specifications.

In response, Ballantine submitted a letter of April 30, 1979, listing options described in the Instruction Manual, which Ballantine stated were included in its initial offer. Ballantine also submitted data concerning similar multimeters produced by it for the Department of the Navy and the Federal Aviation Administration. Ballantine also stated that nothing was altered from its initial offer. In addition, a representative of AARRADCOM visited Ballantine's facilities and "evaluated" its multimeter.

Based on this information, ARRCOM's engineering staff recommended to the contract specialist that award be made to Ballantine. The engineering staff determined that the Ballantine Model 3028A MOD 165, including all options specified in the April 30 letter, complied with all of the essential requirements. However, the engineering staff stated that since the data submitted by Ballantine was "unsubstantiated for the specific model in question," three first production units should be submitted by Ballantine with "specific data that certifies that the items meet the * * * requirements."

The engineering staff recommended that the three first production units be delivered to destinations which were not in the delivery schedule in the RFP. ARRCOM telephoned Ballantine and asked if the delivery change would necessitate any price increases. Ballantine replied that its price would remain the same.

Negotiations with Ballantine

Fluke contends that ARRCOM held substantive negotiations with Ballantine after the second request for best

and final offers, and that holding such negotiations with one offeror requires that negotiations be held with all offerors. Fluke points out that Ballantine's initial offer was determined to be unacceptable and, notwithstanding Ballantine's statement that its offer would be modified to meet the requirements, its best and final offers never modified its initial offer. Therefore, Ballantine's letter of April 30 and attached data constituted a substantial modification of its offer. Fluke also contends that the change in delivery schedule and the opportunity given Ballantine to revise its price in response constituted negotiations. Since Ballantine was given the opportunity to revise its proposal, the Government was required to give Fluke the same opportunity.

Essentially, the Department of the Army (Army) admits that communications occurred with Ballantine, but characterizes them as permissible "clarifications." According to the Army, Ballantine's offer was never changed. ARRCOM was initially confused as to what Ballantine was offering, and the information later submitted by Ballantine merely clarified what was being offered and permitted ARRCOM to determine that it was acceptable. Concerning the delivery change, the Army states that this change did not affect Fluke because if it had been the offeror no change would have been made. The Army further states that when it asked Ballantine if its price would be increased because of the delivery change, it was referring only to a possible increase of a "trivial" \$2.11 in shipping costs for the three first production units. Ballantine's unit price was never open to negotiation.

For the following reasons we agree with Fluke that ARRCOM improperly held discussions with Ballantine after the final submission of best and final offers.

In negotiated procurements, meaningful discussions must be held, except in certain circumstances not applicable here, with all offerors whose initial proposals are acceptable or are capable of being made so. Defense Acquisition Regulation (DAR) §§ 3-805.1 & 2 (1976 ed.). Discussions should be concluded with a common cutoff date for the submission of best and

final offers. DAR § 3-805.3(d). If discussions are reopened with one offeror after the receipt of best and final offers, they must be reopened with all offerors in the competitive range and an opportunity given to submit revised proposals. University of New Orleans, B-184194, September 19, 1977, 77-2 CPD 201. However, inquiries to an offeror for the sole purpose of eliminating minor uncertainties or irregularities in a proposal constitute clarifications rather than discussions, and do not require reopening discussions with all offerors.

Whether discussions have been held is a matter to be determined on the basis of the actions of the parties, and not merely the characterization thereof by the contracting officer. New Hampshire-Vermont Health Service, 57 Comp. Gen. 347 (1978), 78-1 CPD 202. We have held that discussions occur if an offeror is afforded an opportunity to revise or modify its proposal. 51 Comp. Gen. 479 (1972). Discussions also occur when the information requested and provided is essential for determining the acceptability of a proposal. The Human Resources Company, B-187153, November 30, 1976, 76-2 CPD 459.

The record clearly shows that the information requested and submitted did change Ballantine's proposal. In fact, the Army admits that it could not determine what Ballantine's multimeter consisted of, and whether it met all requirements until it received the April 30 letter and test data from Ballantine. That information was essential for determining the acceptability of Ballantine's offer. The Army cites Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD 404, and General Kinetics, Inc., B-190359, March 24, 1978, 78-1 CPD 231, in support of its contention that the exchange with Ballantine amounted to clarifications rather than discussions. In both of those cases, however, no new information was solicited or submitted. Here, the description of the multimeter and the test data was new information and was essential for determining the acceptability of Ballantine's offer.

The proper procedure in this case would have been for the Army to point out the deficiencies in

Ballantine's offer before discussions were concluded and to give Ballantine the chance to revise its offer at that time. Alternatively, once the Army had asked Ballantine, after best and finals, for information necessary to determine the proposal's acceptability, it should have asked for another round of best and final offers from both offerors, with the opportunity to revise their proposals in any manner desired.

Testing Requirement

Essentially, Fluke argues that Drawing No. 11744661 requires any nonapproved source to have its multimeter tested and approved by AARRADCOM. The Army contends that Ballantine's submission of test data and information concerning performance on previous contracts with other agencies for similar items satisfies the testing requirement. Since the second sentence of the testing requirement does not explicitly state that AARRADCOM is the only acceptable command for testing and approval and the requirement does not explicitly specify the time and manner of testing, we do not think that the Army's interpretation is unreasonable.

Recommendation

We have been advised that the contract is nearly completed; therefore, termination of the contract would not be in the best interests of the Government. For future procurements, the Army should adhere to proper negotiation practices.



For The Comptroller General
of the United States