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

FILE: B-210709 **DATE:** June 30, 1983

MATTER OF: Informatics General Corporation

DIGEST:

Protester's contention that the agency erred in excluding its technically acceptable proposal from the competitive range without discussions is denied, since the record shows that the agency had a reasonable basis for its belief that the protester's initial price, which was 44 percent higher than the price of the low technically acceptable proposal, was so far out of line with the prices of the other proposals that the protester's proposal did not have a reasonable chance of being selected for award.

Informatics General Corporation protests the exclusion from the competitive range of its proposal submitted in response to request for proposals (RFP) No. DT0559-81-R-00144, which was issued by the Department of Transportation for teleprocessing services. The proposal was found to be technically acceptable but so far out of line with the other offers with respect to price that it was rejected without negotiations. Informatics, the incumbent contractor, contends that under the wording of the RFP the agency was required to conduct price negotiations with all offerors with technically acceptable proposals unless the agency made award based on the initial proposals.

The protest is denied.

There is no dispute as to the technical acceptability of Informatics' proposal and its successful benchmark verification. The primary issue is whether the agency properly excluded Informatics' proposal from the competitive range without discussions solely because its cost proposal, which was submitted after the benchmark test, was determined to be so far out of line with respect to price as to render discussions useless.

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The RFP advised offerors to submit their initial proposals on the most favorable terms and conditions because award might be made on the basis of such proposals without discussions. The solicitation stated that those offerors whose proposals met all mandatory requirements and whose equipment passed the benchmark verification tests would be given the opportunity to discuss with the contracting officer any outstanding questions regarding their proposals. Another RFP provision stated that the agency intended to assure maximum competition and that each offeror would have adequate time to submit its proposal, complete the benchmark, furnish additional necessary information and submit a best and final offer. The evaluation provision set out a sequence of procurement events, one of which stated that offerors "may" be given an opportunity to submit best and final offers. During a preproposal conference, offerors were informed that best and final offers would not necessarily be requested from all technically qualified vendors, depending on the evaluations.

Informatics contends that under the terms of the RFP, the agency, unless it could make award based on the initial proposals, was obligated to negotiate with it because its proposal was technically acceptable. Informatics argues that, in any event, a proposal cannot be excluded from the competitive range unless it is so technically inferior or out of line as to price as to make discussions meaningless, which Informatics denies was the case here. In this respect, Informatics complains that the agency ignored a letter the firm sent before the competitive range determination stating it was prepared to lower its price; the protester suggests that because of the competitive and technically dynamic environment in this industry, the agency should have expected that substantial price reductions could have been made, especially in view of the 5 months that elapsed between the submission of the cost proposals and the competitive range determination.

Generally, discussions in negotiated procurements need be held only with those offerors whose proposals are determined to be within the competitive range, that is, whose proposals have a reasonable chance of being selected for

award. Peter J. T. Nelsen, B-194728, October 29, 1979, 79-2 CPD 302. A contracting officer necessarily has a considerable range of discretion in making a competitive range determination, and we therefore will not question such a determination unless it is without a reasonable basis. Even a technically acceptable proposal may be determined to be outside of the competitive range if there is no reasonable chance that it will be selected for award. See Documentation Associates, B-190238, March 23, 1978, 78-1 CPD 228, where the agency, purportedly to maximize competition, included a technically acceptable proposal in the competitive range even though the agency considered the proposed cost so high that the firm almost certainly would not have been awarded the contract; we stated that we could not understand how competition was enhanced by including such a proposal within the competitive range.

These general principles are so well established that any intention of an agency to waive the right, for example, to exclude a technically acceptable but otherwise noncompetitive offer from the competitive range, should not be drawn through inference or interpretation of selected solicitation terms and conditions. See International Automated Systems, Inc., B-205278, February 8, 1982, 82-1 CPD 110. Here, the solicitation provisions that express the agency's intent to maximize competition and to give offerors the opportunity to submit best and final offers must be read in a manner consistent with those provisions stating that offerors "may" be given the opportunity to submit such offers and the explanation at the preproposal conference that all offerors with technically acceptable proposals would not necessarily be given the chance to submit best and final offers. Informatics' position requires that the word "may" be interpreted as "shall" and that the preproposal explanation be ignored. We think that the RFP as a whole clearly indicates no intention by the agency to waive its established right to exclude technically acceptable proposals whose prices indicate that it would be highly unlikely that they could be selected for award. We believe that the rejection of Informatics' proposal was made in accordance with the only reasonable interpretation of solicitation.

Informatics further contends that, in any event, there was no reasonable basis for excluding its proposal from the competitive range. We find, however, that the contracting officer had a reasonable basis for excluding Informatics' proposal on the basis of its excessive price. Informatics' price was 44 percent higher than the lowest offeror; two other proposals with prices 26 percent and 37 percent higher than the low offeror also were eliminated from the competitive range. The proposed prices of those included were only 14 percent to 16 percent higher than the price of the low offeror. It may be, as Informatics' letter to the agency stated, that it was ready to reduce its price substantially but, at the time of the competitive range deter-mination, the agency had no reason to believe that Informatics could make a sufficient reduction to have a reasonable chance at the award. RKFM Product Corporation, B-186424, September 15, 1976, 76-2 CPD 247. In this respect, initial competitive range determinations are made based on the initial proposals, so that a firm that does not submit its best price at the first opportunity always runs the risk of being excluded from further competition for the award. See United Computing Systems, Inc., B-204045, September 23, 1981, 81-2 CPD 247.

Informatics also complains that the proposed awardee was permitted to modify its proposal prior to the determination of the competitive range. Informatics has submitted an affidavit of its director of marketing stating that a former emloyee of the Department of Transportation had informed him that the proposed awardee was permitted to modify its unbalanced pricing before the competitive range was established. Informatics suggests that our Office obtain the proposal awardee's initial cost proposal, all subsequent amendments to it, and related correspondence, in order to determine whether these contacts constituted discussions. Informatics correctly argues that if discussions were conducted with the proposed awardee, they should have been conducted with all offerors whose proposals were within the competitive range.

The agency, however, denies that the affidavit has any factual basis and asserts that none of the technically acceptable proposals was unbalanced as to price, and that no offeror was permitted to revise its proposal between the time the cost proposals were received and the determination of the competitive range. The agency suspects that the allegation might have resulted from the contracting officer's requests for the additional information necessary

to clarify and verify the cost proposals, which he was entitled to do under the terms of the solicitation. The Department of Transportation points out that as no award has been made and some of the information is proprietary, it would be inappropriate to disclose it to Informatics or the public at this time but that the agency would provide the material for our in camera review if we deemed this to be necessary.

The question as to what constitutes discussions in negotiated procurements depends on whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether this opportunity resulted from actions initiated by the offeror or the agency. 51 Comp. Gen. 479, 481 (1972). Discussions also occur when the information requested and provided is essential for determining the acceptability of a proposal. John Fluke Manufacturing Company, Inc., B-195091, November 20, 1979, 79-2 CPD 367.

According to the Department of Transportation, the proposed awardee was not given an opportunity to revise its proposal prior to the determination of the competitive range, and the information requested was not essential for the determination of the acceptability of its proposal. The agency states that when its cost analysis revealed any unknown factor which could impact future costs, clarification was requested. If the clarification made it clear that the proposal as submitted complied with all requirements, the proposed costs were accepted. If the clarification was insufficient, the agency assessed the cost associated with full compliance with RFP requirements as part of the cost evaluation. In fact, the agency followed this procedure in seeking clarification of Informatics' price proposal, and the firm was permitted to correct several errors in the unit prices in its price tables. The evaluated costs of which each offeror was informed were used to determine the competitive range and the agency is adamant that no offeror was permitted prior to that time to change the evaluated costs or to change its proposal.

We do not believe that the affidavit, which contains information to which Informatics admittedly was not privy, provides sufficient grounds to doubt the agency's unqualified denial that any offeror was permitted to revise

its proposal prior to the competitive range determination, and the agency's contention that the inquiries were for clarification purposes only. As the protester, Informatics bears the burden of proving its case, and that burden is not met where the only evidence is conflicting statements by the protester and the agency. Alchemy, Inc., B-207954, January 10, 1983, 83-1 CPD 18.

Finally, Informatics contends that the exclusion of its proposal was caused by the agency's erroneous understanding as to the permissible scope of negotiations, and that DOT could have negotiated a price decrease with Informatics.

While such a decrease could have been negotiated if discussions were conducted, the agency clearly was trying to avoid discussions while seeking price clarifications prior to its competitive range determination. In such cases, the constraints upon an agency are much greater than when discussions are actually conducted, since clarifications that result in material changes to an offeror's proposal would constitute discussions. See New Hampshire-Vermont Health Service, 57 Comp. Gen. 348 (1978), 78-1 CPD 202. As shown above, no offer was changed or determined to be unacceptable as a result of these clarifications. Informatics' proposal was excluded solely because its initial price, as clarified, was out of line with those of the other acceptable proposals. Therefore, Informatics' contention is without merit.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States