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# DECISION

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

**FILE:** B-210849 **DATE:** October 12, 1983

**MATTER OF:** Cotton & Company

**DIGEST:**

1. There is nothing improper per se in an agency establishing a revised competitive range after negotiations; the fact that an offeror included in the initial competitive range but subsequently excluded will thus be deprived of the opportunity to submit a best and final offer is not cause for objection where the revised competitive range determination was reasonable.

2. An agency's decision to exclude the protester's second highest rated proposal from the revised competitive range after negotiations was reasonable, even though only the highest rated offeror was left in the competitive range, where: (1) technical merit, not proposal cost was the primary consideration in awarding the cost-reimbursement type contract; (2) the protester's lower experience rating likely could not be improved in a best and final offer; and (3) it does not appear the protester could have reduced its proposed costs sufficiently to offset the other offeror's technical superiority.

Cotton & Company protests the award of a contract to Leonard G. Birnbaum & Company under request for proposals (RFP) No. 283-83-0001, issued by the Department of Health and Human Services, National Institute on Drug Abuse (NIDA), for financial advisory services. We deny the protest.

The RFP contemplated the award of a cost-plus-fixed-fee contract. Award was to be based primarily on technical merit, cost becoming determinative if offers were

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considered technically equal. Seven proposals were submitted prior to the closing date, four of which were included in a competitive range based on an initial technical review. The evaluation results were as follows:

| | Score | Proposed Cost |
|---|---|---|
| Birnbaum | 97.4 | $52,155 |
| Cotton | 86.8 | 57,752 |
| Sho Iino Accountants | 84.6 | 92,755 |
| Bert W. Smith, Jr. & Co. | 83.4 | 48,739 |

Following the initial technical evaluation, NIDA requested clarifying information from Cotton and the two lower rated offerors; NIDA found that Birnbaum's proposal needed no further clarification. A second technical evaluation taking into account this additional information yielded the following scores[1]:

| | Score |
|---|---|
| Birnbaum | 97.4 |
| Cotton | 92.4 |
| Smith | 89.2 |
| Sho Iino | 85.8 |

Based on this second review, the evaluation committee determined that Birnbaum's proposal was superior to the other three (which it considered technically equal). The contracting officer adopted this finding and in a memorandum entitled "Revised Determination of Competitive Range," excluded Cotton and the two lower rated offerors from the competitive range because they "no longer stand a reasonable chance of being selected for award." NIDA subsequently initiated cost negotiations with Birnbaum, the only offeror remaining in the competitive range, and requested its best and final offer. Birnbaum timely submitted a best and final offer lowering its proposed cost to $51,743, and NIDA awarded the contract to Birnbaum.

[1] There is no indication that any changes were made in the cost proposals.

Cotton argues that the procedure followed by NIDA--*i.e.*, redefining the competitive range after negotiations to eliminate all but one offeror from the competition--was improper because it deprived Cotton of the opportunity to improve its standing by submitting a best and final offer. Cotton submits that under the Department of Health and Human Services Procurement Regulations (HHSPR) § 3-3.5109, all offerors initially included in the competitive range must be permitted to submit a best and final offer.

There is nothing improper *per se* in an agency's making more than one competitive range determination. *See SDC Integrated Services, Inc.*, B-195624, January 15, 1980, 80-1 CPD 44; *WASSKA Technical Systems and Research Company*, B-189573, August 10, 1979, 79-2 CPD 110. While in the cited cases the second competitive range determination resulted in the exclusion of only technically unacceptable proposals, we believe the same principle applies where, as here, the agency excludes proposals found to no longer have a reasonable chance of being selected for award. It clearly would serve no practical purpose to request the offeror's best and final offer where the contracting officer has properly determined, either before or after negotiations, that the offeror will not receive the award. This approach is consistent with HHSPR § 3-3.5109, which merely states, in relevant part, that in order to terminate negotiations, "each offeror within the competitive range" should be advised to submit a best and final offer. Since Cotton was excluded from the competitive range after negotiations, NIDA was not required to solicit Cotton's best and final offer. *See SDC Integrated Services, Inc., supra*.

The determinative question in this case is not whether a second competitive range was proper, but whether NIDA was justified in excluding Cotton from the competitive range at all, given the apparent closeness of Cotton's and Birnbaum's scores and proposed costs after negotiations. Cotton maintains that NIDA's conclusion that it did not stand a reasonable chance for award, was "unfounded and wholly unsupported."

As a general rule, an agency should endeavor to include in the competitive range any proposal considered technically acceptable, particularly a proposal which, like

Cotton's, seems close in quality and cost to the highest rated proposal. Only in this manner can maximum competition and fairness to the offerors be maintained. It is well-established, on the other hand, that the determination of whether a proposal is within the competitive range is principally a matter of administrative discretion. Although we carefully scrutinize decisions which, as was the case here, result in a competitive range of one, Art Anderson Associates, B-193054, January 29, 1980, 80-1 CPD 77, we will not disturb an agency's decision on competitive range absent a clear showing that it was unreasonable or contrary to procurement statutes and regulations. See TechDyn Systems Corporation, B-206228, June 28, 1982, 82-1 CPD 628. Based on the general rule cited above, it is clear that Cotton's proposal could have been included in the final competitive range for purposes of submitting a best and final offer. At the same time, however, based on our standard of review, we cannot conclude that NIDA's exclusion of Cotton from the competitive range was unreasonable or improper.

After the initial technical review, Cotton was asked to submit clarifying information covering several areas, including the experience of its proposed staff and special consultants. While this information was found sufficient to increase Cotton's score significantly, the evaluators and the contracting officer still considered Cotton weak in experience. This weakness reportedly accounted in large part for the disparity between Cotton's final score of 92.4 and Birnbaum's score of 97.4. At this point, the contracting officer, based on the competition available in this procurement (i.e., Birnbaum's superior proposal), decided that on a relative scale Cotton and the other lower offerors were not in the competitive range. We have approved this "relative" approach to determining the competitive range based upon the scores obtained by the offerors. See Art Anderson Associates, supra. The record adequately supports NIDA's conclusion that, considering the strength of Birnbaum's proposal, Cotton no longer stood a reasonable chance of receiving the award.

Since by its nature the required experience had to have been accumulated prior to this procurement, we agree with NIDA's apparent determination that Cotton's rating in this area could not be expected to be improved in a best and final offer. We note that Cotton does not indicate how, or whether, it planned to upgrade its proposal in this area. Similarly, since Cotton's proposed cost was 10 percent higher than Birnbaum's and both proposals already were substantially lower than NIDA's estimate of $98,601, we believe NIDA reasonably determined that Cotton could not reduce its cost sufficiently to offset Birnbaum's technical advantage. Again, Cotton does not specifically state otherwise. In any event, estimated costs are not controlling in selecting a contractor for a cost-reimbursement type contract. *See* Federal Procurement Regulations § 1-3.805-2

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States