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

FILE: B-216953 **DATE:** March 22, 1985

MATTER OF: Kisco Company, Inc.

DIGEST:

1. GAO will dismiss as untimely issues raised after initial protest was filed because they are new grounds of protest and should have been raised either within 10 working days after the protester knew of them or, in the case of alleged solicitation deficiencies, before the closing date for receipt of initial proposals.

2. In a negotiated procurement, although an agency may in certain circumstances make award on the basis of initial proposals, the decision to do so is discretionary and no offeror has a legal right to such an award.

3. After submission of initial proposals, agency may exercise administrative discretion in amending RFP to increase quantity being procured by 5 percent when record shows that change is necessary to ensure satisfaction of government's needs and change is not de minimus. Amendments to increase quantities are specifically authorized by FAR, 48 C.F.R. § 15.606(a).

4. Speculation that amending RFP to increase procured quantity resulted in an auction and improper disclosure of protester's price, an allegation that the procuring activity denies, does not meet protester's burden of proof.

Kisco Company, Inc. protests the proposed award of a contract to any other offeror pursuant to request for proposals (RFP) No. DAAA09-84-R-0369, issued by the U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois.

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We dismiss the protest in part and deny the remainder.

On August 5, 1984, the Army requested proposals for 654,550 40-millimeter, M430 Body Assemblies (part of hand grenades) and on September 11, 1984, it received initial proposals. By telex message dated October 22, 1984, the Army increased the quantity of the requirement by 33,332 units to a total of 687,882 units, requesting best and finals from the offerors in the competitive range, including Kisco. These were to be submitted by close of business October 24, 1984.

By telex message filed with our Office on October 26, 1984, Kisco alleged that it was arbitrary and capricious to amend the solicitation after prices had been disclosed. Additionally, by letter dated November 13, 1984, and in comments dated January 14, 1985, the protester supplemented its protest, contending that the requirement should have been advertised rather than negotiated and that the agency, by telegraphically increasing the quantity requirement, failed to issue a proper solicitation amendment. Kisco requests that the Army be directed either to award the contract to it or to cancel and resolicit, combining fiscal year 1984 and 1985 requirements. Kisco also seeks proposal preparation costs.

The supplemental protests by Kisco are untimely. Kisco's contention that the procurement should have been advertised, rather than negotiated, [illegible] a defect apparent on the face of the solicitation and therefore should have been filed before the September 11 closing date for receipt of initial proposals. See 4 C.F.R. § 21.2(b)(1) (1984). Since this ground of protest was not raised until November 13, 1984, it is untimely and not for consideration. Anderson Engineering and Testing Co., B-208632, Jan. 31, 1983, 83-1 CPD ¶ 99.

As for Kisco's January 14, 1985 submission arguing that the Army's telex message did not comply with regulations requiring written amendments, this basis for protest, raised after the initial protest was filed, must independently meet our timeliness standards. Booz, Allen & Hamilton, 63 Comp. Gen. 599 (1984), 84-2 CPD ¶ 329. Since it was not raised within 10 working days after the basis

for protest was known, it does not and therefore is untimely and also not for consideration. See 4 C.F.R. § 21.2(b)(2).[1]/

The protester timely contends that award should have been made on the basis of initial proposals and that there was no rational basis for the agency to amend the solicitation and request best and final offers, so that an allegedly improper auction resulted. According to the protester, the quantity increase was an "insignificant" 5.09 percent. On the other hand, according to the Army, the decision to amend the solicitation was required by the Federal Acquisition Regulation (FAR), which provides for RFPs to be amended either before or after receipt of proposals where the government's requirements change or the agency decides to relax, increase, or otherwise modify its requirements. See 48 C.F.R. § 15.606(a) (1984).

The FAR permits agencies to make award on the basis of initial proposals where it can be demonstrated that acceptance of the most favorable offer without discussions would result in a fair and reasonable price. See 48 C.F.R. § 15.610. The decision whether to award on the basis of initial proposals is discretionary, however, 52 Comp. Gen. 425 (1973), and an offeror has no legal right to insist that award be made on this basis. Consequently, regardless of whether the agency's amendment of the RFP was proper, Kisco has no right to award based on its initial proposal. Townsend & Co., B-211762, Mar. 27, 1984, 84-1 CPD ¶ 352.

As for the allegedly improper amendment, whether to issue a amendment is essentially a discretionary matter

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[1]/ We note here that the Army filed late rebuttal comments with our Office on February 20, 1985. Our Bid Protest Procedures state that unsolicited agency rebuttals shall be considered if filed within 5 days after receipt by the agency of the comments to which the rebuttal is directed. 4 C.F.R. § 21.3(d). Although we have considered rebuttal comments that were filed late, see, e.g., Interstate Court Reporters, B-208881.2, Feb. 9, 1983, 83-1 CPD ¶ 145, in this instance we did not find them necessary to the disposition of the protest, and therefore we did not evaluate them in arriving at our decision. See Environmental Tectonics Corp., B-183616, Oct. 31, 1975, 75-2 CPD ¶ 266.

for the agency. Patty Precision Products Co., B-182861, May 8, 1975, 75-1 CPD ¶ 286. An agency is not required to amend an RFP when there is only a de minimus change in requirements. Telos Computing, Inc., 57 Comp. Gen. 370 (1978), 78-1 CPD ¶ 235 (removal of 1 of 617 equipment items to be serviced). Amendment of an RFP is justified, however, when there is a substantial or material change in requirements. 50 Comp. Gen. 619 (1971); Cadillac Gage Co., B-209102, July 15, 1983, 83-2 CPD ¶ 96 at 13. Cf. U.S. District Court for the District of Columbia, 58 Comp. Gen. 451 (1979), 79-1 CPD ¶ 301 (failure to issue written amendment does not prejudice sole source offeror that is on notice of substantial changes). Even when there is a request for new best and final offers that is not based on a substantial change in requirements, we will not question the propriety of an award on this basis unless there is a showing that such action is fraudulent, capricious, arbitrary, or so grossly erroneous as to imply bad faith. See Bell Aerospace Co., 55 Comp. Gen. 244, 247 (1975), 75-2 CPD ¶ 168 (involving more than one round of best and final offers).

The general rule is that an RFP may be revised after receipt of initial proposals when such action is necessary to ensure that the government's needs will be satisfied. Sub-Sea Systems, Inc., B-195741, Feb. 12, 1980, 80-1 CPD ¶ 123. In this instance, the increased quantity requirement became known after the closing date for receipt of initial proposals, as evidenced by the Procurement Work Directive Amendment dated September 16, 1984. Once that requirement became known, the contracting officer clearly did not act improperly by amending the solicitation since increases in contract requirements are a specific reason given in FAR for amending a solicitation. See 48 C.F.R. § 15.606(a). Further, in our opinion, an increase of more than 33,000 units, even though an increase of only approximately 5 percent, was not a de minimus change in requirements.

The protester maintains that there were methods other than amendment after receipt of initial proposals to increase the requirement. According to Kisco, the additional quantity could have been procured as part of the Army's fiscal year 1985 requirement because the

delivery schedules for fiscal years 1984 and 1985 overlap. Alternatively, the protester contends that the Army could have obtained the additional quantity through exercise of an option clause that gave the Army the right to increase the quantity by 200 percent at a separate unit price.

Although the protester disagrees with the agency's method of procuring the increased requirement, the determination of the government's needs and the best method of accommodating them are primarily the responsibilities of the procuring activity. See A.T. Kearney, Inc., B-205898.2, Feb. 28, 1983, 83-1 CPD ¶ 190. The record does not indicate precisely why the Army determined that amendment for fiscal year 1984 was appropriate. However, the Army reasonably could have believed, for example, that economies of scale and other factors associated with increased quantities would affect originally-offered prices or prices for the additional units. The protester simply has not shown that the contracting officer abused his discretion here.

The protester asserts that the opening of negotiations after receipt of initial proposals resulted in an improper auction in violation of the FAR, 48 C.F.R. § 15.610(d)(3)(iii), because, it alleges, its pricing information was improperly disclosed to other offerors during the 6-week period between the submission of initial proposals and the opening of negotiations. Although the protester acknowledges that it does not have actual evidence of price disclosure, it believes that an investigation will disclose a pattern of prices that strongly suggests an auction. The Army denies this allegation.

Our Office normally does not conduct investigations in its bid protest function. Instead, we base our decisions on written submissions of the parties, with protesters bearing the burden of proof. P-III Associates, B-213856 et al., July 31, 1984, 84-2 CPD ¶ 136. In this case, cognizant agency officials have provided affidavits stating that they did not disclose Kisco's price to other offerors. Absent any probative evidence of actual disclosure, we must assume that Kisco's allegation is speculative and that Kisco has not met its burden of proof. Energy and Resource Consultants, Inc., B-205636, Sept. 22, 1982, 82-2 CPD ¶ 258.

The protest is dismissed in part and denied in part; as the protest is without merit, Kisco's claim for bid preparation costs also is denied.

for Harry R. Van Cleve
General Counsel