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DECISION

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

FILE: B-219388 **DATE:** August 27, 1985

MATTER OF: L.W. Milby, Inc.

DIGEST:

1. An award made on the basis of initial proposals was proper where the solicitation notified offerors that award might be made on the basis of initial proposals, without discussions, and the number of proposals and the range of prices support the contracting agency's conclusion that there was adequate competition resulting in a reasonable price to the government.

2. Protester could not reasonably assume that the contracting agency waived the right to make award without discussions, based on contracting officer's statement at preproposal conference that a typical schedule for the procurement would include submission of best and final offers, and contracting officer at same conference cautioned offerors that the solicitation (which reserved the government's right to make award without discussions) would not be modified except by written amendment.

3. Protester fails to show that contracting agency conducted discussions with only some offerors where only evidence offered is a statement allegedly made by another offeror and all contracting agency personnel involved in the procurement deny having any communications with any offeror after initial proposals were received.

4. Protester's contention that contracting agency engaged in technical transfusion or leveling is without merit where there is no evidence of any discussions with any offeror and awardee's proposal does not contain the technical feature which the protester contends was transferred to it by the agency.

L.W. Milby, Inc., protests any award under request for proposals (RFP) No. DACW43-85-R-0026, issued by the Corps of Engineers for exhibits to be installed at the visitor center at Lake Shelbyville, Illinois. The protester contends that the Corps improperly failed to conduct negotiations with all the firms which submitted offers under the solicitation. We deny the protest.

The RFP, issued on March 29, 1985, called for proposals to build and install visitor center exhibits relating to the Lake Shelbyville project. A preproposal conference held on April 16 was attended by representatives from Milby and four other prospective offerors. Initial proposals were received from eight offerors by May 10, the closing date for receipt of proposals.

On May 16, the Corps' technical evaluation team completed the evaluation of the eight proposals and concluded that the proposal submitted by Design Craftsmen, Inc., was so far superior to the other proposals with regard to technical considerations and price that none of the other offerors had a reasonable chance of receiving award. Specifically, out of a total of 400 points, the Design Craftsmen proposal received a score of 380 points, consisting of 300 points for its technical proposal and 80 points for its price ($82,014). The second through fifth ranked offerors, while relatively close on technical scores, were considerably higher priced, and received total scores ranging from 354 to 323 points. Milby was ranked sixth, with a total score of 290 points, 230 points for its technical proposal and 60 points for price ($89,115, approximately $7,000 more than the awardee's price).

Based on these findings, the technical evaluation team recommended that award be made to Design Craftsmen without conducting discussions with the other offerors. The technical team's evaluation was reviewed by an ad hoc committee of Corps officials who concluded that the evaluation had been done in accordance with the evaluation criteria in the RFP. The committee also recommended award to Design Craftsmen without further discussions. On May 23, award to Design Craftsmen was approved by the contracting officer; actual award was made on June 4.

Milby first contends that the Corps was required to conduct discussions and give the offerors an opportunity to submit best and final offers before making award. In a negotiated procurement, discussions generally are required to be conducted with offerors in the competitive range.

10 U.S.C. § 2304(g) (1982). Award may be made on the basis of initial proposals, however, where there is adequate competition to ensure that award without discussions will result in a fair and reasonable price, and the solicitation advises offerors of the possibility that award might be made without discussions. D-K Associates, Inc., B-213417, Apr. 9, 1984, 84-1 CPD ¶ 396; Federal Acquisition Regulation (FAR) § 15.610(a)(3). Here, the Corps received eight proposals, and found that award to Design Craftsmen, whose proposal was the highest ranked technically as well as the lowest priced, would result in a fair and reasonable price to the government. We have no basis upon which to disagree with the Corps finding.

In addition, section "L," paragraph 17(c) of the RFP stated that the person signing an offeror's proposal must be authorized to commit the offeror to all provisions of its offer, "fully recognizing that the Government has the right, by the terms of the RFP, to make an award without further discussions, if it so elects." This provision notified offerors that the Corps reserved the right to make award on the basis of initial proposals. We find unpersuasive Milby's contention that including this condition in only one provision of a lengthy solicitation did not constitute sufficient notice to the offerors. Cf Tiernay Manufacturing Co., B-209035, Dec. 20, 1982, 82-2 CPD ¶ 552 (incorporation by reference of a standard form puts offerors on notice of its contents).

The protester also argues that a contracting official waived the government's right to make award without discussions by implying at the preproposal conference that best and final offers would be requested. The minutes of the conference indicate that a contracting official was asked whether a delay in return of proposals to the unsuccessful offerors after award was made, as had occurred in a prior procurement for exhibit materials, could be expected in this procurement as well. In reply the official stated that the initial evaluation was scheduled to take place within 2 weeks after the proposals were received, followed by issuance of a timetable for submission of best and final offers and award of the contract. The Corps states that the agency intended only to estimate the amount of time typically involved in conducting this and similar procurements.

We agree that the contracting officials' statement at most indicated his expectation that this procurement would follow the typical pattern of discussions and submission

of best and final offers before award is made. In our view, it was unreasonable for the protester to assume that the contracting officer's statement reflected a decision by the Corps, before initial proposals had even been submitted, to waive the right reserved in the RFP to make award based on initial proposals. See International Automated Systems, Inc., B-205278, Feb. 8, 1982, 82-1 CPD ¶ 110. In addition, the conference minutes show that the contracting officer advised the offerors that all provisions of the RFP would remain as originally drafted except to the extent that written amendments were issued.

The protester next argues that the Corps improperly held discussions with only some of the other offerors. This contention is based on a conversation with another offeror who is said to have told Milby that discussions had been held with certain other offerors. According to the agency report, all the members of the Corps' technical team and ad hoc committee, the contracting officer, and the individual named in the RFP as the Corps' contact point, deny having any communications with any offeror after initial proposals were received.

We find that Milby has presented no reliable evidence that the Corps conducted discussions with only some of the offerors. The protester has the burden of affirmatively proving this allegation. Energy and Resource Consultants, Inc., B-205636, Sept. 22, 1982, 82-2 CPD ¶ 258. The only evidence Milby offers in support of its contention, however, is an unsubstantiated statement attributed to another offeror. Where, as here, the contracting agency denies the protester's contention and the protester fails to furnish any probative evidence, the protester has failed to meet its burden of proof.[1]/ The Trade Group, B-212544, Oct. 24, 1983, 83-2 CPD ¶ 484.

The protester's next argument concerns the requirement in section "C," paragraph 3.1 of the RFP that the contractor produce and install a visitor-activated

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[1]/ The protester states that it has submitted a request under the Freedom of Information Act (FOIA) regarding this procurement. If the protester receives information pursuant to its FOIA request which constitutes probative evidence of its contention, the protester may file a protest based on that information within 10 days of receiving it. Fairchild Weston Systems, B-218470, July 11, 1985, 85-2 CPD ¶ ___.

computer in the exhibit relating to the history and functions of the Corps. Specifically, paragraph 3.1.1 defines the objective of the exhibit as acquainting visitors with the history and responsibilities of the Corps, including its role in the Army and national defense; paragraph 3.1.3 requires offerors to provide a visitor-activated computer program, including graphics and text, focusing on the Corps' different functions and the facilities it administers.

The protester refers to an article appearing in the Shelbyville Daily Union newspaper on May 23, which described the general plans for the Lake Shelbyville visitor center. With regard to the exhibit on the Corps' history and functions, called a "computer game" in the article, an agency official was quoted as follows:

> "It won't have Pac-Man in it, but trivia on the Corps nationwide . . . . This will orient people to our authority and purpose at Lake Shelbyville. It will explain the purposes of things like flood control, wildlife management, navigating the water supply and the multi-pump project."

Milby maintains that the agency official's statement represents a revision to the RFP requirement for a computer exhibit and describes a concept for a "computer game" contained in another unsuccessful offeror's proposal. Milby further states that the awardee's proposal does not have a computer game feature of the kind described by the agency official in the newspaper article, and maintains that the awardee must have been told about the feature by the Corps. Milby concludes that the Corps thus engaged in improper technical transfusion or leveling. We disagree.

We note first that the characterization of the exhibit as a "computer game" was made by the writer of the article, not the agency official. In our view, the quoted statement was no more than a restatement of the RFP requirement for the exhibit; it does not necessarily reflect a particular approach, as the protester contends. Even assuming the remarks did refer to a particular approach to the requirement--a "computer game"--there is no evidence in the record that the awardee's proposal included that approach. On the contrary, as the protester concedes, the awardee's initial proposal did not offer the approach referred to by Milby. Further, the Corps states that the awardee was not allowed to modify its proposal

either before or after award, and, as discussed above, Milby has presented no probative evidence of improper discussions to refute the agency's position.

Finally, Milby argues that if the Corps' failure to conduct discussions with Milby reflected the Corps' decision to exclude it from the competitive range, the Corps failed to notify Milby of its exclusion as required by FAR § 15.609(c). Since, as discussed above, the Corps decided to make award on the basis of initial proposals, no competitive range determination was made and, consequently, no notice to Milby was required.

The protest is denied.

The protester has requested that it be awarded the costs of pursuing the protest, including attorney's fees, and proposal preparation costs. Recovery of such costs is allowed only where a protest is found to have merit. 31 U.S.C. § 3554(c)(1), as added by section 2741(a) of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1175, 1199; Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1985). Since we have denied the protest, we also disallow the protester's request for recovery of costs.

for Seymour Efros
Harry R. Van Cleve
General Counsel