**DECISION**

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

**FILE:** B-221386 **DATE:** April 3, 1986

**MATTER OF:** Kitco, Inc.

**DIGEST:**

1. The Federal Acquisition Regulation's requirement for the integrity of unit prices is not violated by an offer of identical unit prices for items with allegedly dissimilar base costs where the alleged violation has not been shown to have worked to the prejudice of the protester.

2. A price proposal cannot be materially unbalanced where it is both low in the base year and also low in each of the four option years, since an award will ultimately result in the lowest overall cost to the government.

3. An agency's determination that a proposal to furnish aircraft structural modification kits was technically acceptable was reasonable where all that was required under the solicitation's evaluation criteria was a demonstration that the offeror have the capability to design kits that would meet the agency's needs, rather than a precise showing of what parts the kits would eventually contain.

4. By awarding a contract, an agency has determined a firm to be a responsible prospective contractor, and the General Accounting Office, therefore, will not review a challenge to that affirmative determination on the basis of the protester's continued assertion that the manner in which the awardee chose to configure and price aircraft structural modification kits reflected its lack of technical capability to perform the work.

Kitco, Inc. protests the award of a contract to Algonquin Parts, Inc. under request for proposals (RFP) No. F42600-85-R-7861, issued by the Department of the Air Force. The procurement is for the acquisition of structural modification kits to prolong the service life of RF-4C

aircraft. Kitco complains that the award was improper because Algonquin obtained an unfair competitive advantage by offering identical unit prices for line items with dissimilar base costs in derogation of the applicable procurement regulation. Kitco also alleges that the Air Force acted in bad faith by disregarding the solicitation's established evaluation criteria and in ultimately concluding that Algonquin was a responsible prospective contractor to perform the effort. We deny the protest in part and dismiss it in part.

Background

The RFP contemplated the award of a firm-fixed-price, definite quantity contract for a base year plus four option years. Offerors were requested to submit technical and price proposals for the design, development, trial installation, proofing, and production of the structural modification kits, the configurations of which would be determined by extracting necessary data from existing government documents. The RFP further provided that technical proposals would be evaluated as being either acceptable, acceptable with minor clarifications, or unacceptable, and that the award would be made to the technically acceptable and responsible offeror submitting the lowest price proposal. Additionally, the RFP advised offerors that the government might award the contract on the basis of initial proposals, without discussions.

Three offerors responded to the solicitation. The proposals of Algonquin and Flameco Engineering were deemed to be technically acceptable as submitted, whereas Kitco's proposal was evaluated as being technically acceptable with the need for minor clarifications.[1] Since Algonquin's price proposal was low at $2.9 million, the firm was selected for the award.[2]

Kitco asserts that Algonquin's offer should have been rejected because Algonquin allegedly violated the applicable provision of the Federal Acquisition Regulation (FAR) requiring the integrity of unit prices. In this regard, Kitco principally contends that Algonquin offered identical unit prices for the T-6 and T-73 structural modification

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[1] The Air Force requested Kitco for more information regarding the background and capability of a proposed subcontractor, which information Kitco then satisfactorily furnished to the Air Force.

[2] Kitco priced its proposal at $3.5 million; the government's estimate was $4.0 million.

kits[3]/, which, Kitco argues, should be markedly dissimilar in terms of parts configuration. Therefore, Kitco believes that Algonquin improperly distorted the unit prices for the kits to gain an unfair competitive advantage, since the actual base costs of those kits were not reasonably reflected in the prices offered for them.

Alternatively, Kitco argues that even if Algonquin offered identical unit prices for the T-6 and T-73 kits because it intended to configure the kits with the same type and number of parts, then this clearly indicates that Algonquin did not understand the nature of the work required under the RFP. Hence, Kitco contends that the Air Force acted in bad faith by disregarding the solicitation's established evaluation criteria to determine that Algonquin's proposal was technically acceptable. Kitco objects to the fact that the award was made solely on the basis of price without any apparent regard for technical considerations.

Finally, and in conjunction with the above issues, Kitco contends that the Air Force acted improperly in determining that Algonquin was a responsible prospective contractor for the work. Kitco urges that the Air Force should have conducted a preaward survey with regard to Algonquin's technical capability before proceeding to make the award.

Analysis

We find no merit in Kitco's argument that Algonquin's offer was rendered unacceptable because Algonquin offered identical unit prices for the T-6 and T-73 modification kits. It is true, as Kitco notes, that the FAR provides that unit prices shall be in proportion to the actual base costs, i.e., manufacturing or acquisition costs, of the items, and that any method of distributing costs to line items that distorts the unit prices shall not be used. Thus, distributing costs equally among line items is not acceptable except where there is little or no variation in base costs. FAR, § 15.812-1(a) (FAC 84-10, July 3, 1985).[4]/

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[3]/ As explained by the Air Force, the terms "T-6" and "T-73" refer to the different types of heat-treated aluminum alloys used in RF-4C aircraft.

[4]/ This provision is implemented by FAR, § 52.215-26, "INTEGRITY OF UNIT PRICES," as incorporated into the subject RFP.

However, we do not agree that Algonquin necessarily violated this provision by offering both the T-6 and T-73 production kits at an identical unit price of $9,000 in the base year and $7,200 in each of the four option years. In our view, as we discuss more fully below, there is no support for Kitco's argument that the T-6 and T-73 modification kits should be fundamentally different in terms of configuration. Thus, we cannot conclude that the base costs of the two kits are so inherently dissimilar that the equal unit prices offered by Algonquin constituted a distortion of those prices in violation of FAR, § 15.812-1(a), supra.

In any event, we believe the only real question to be resolved on this issue is whether, as asserted by Kitco, Algonquin gained an unfair competitive advantage by offering identical unit prices for the two kits. Although we are unaware of any prior decision of this Office involving an alleged violation of the FAR's requirement for the integrity of unit prices, we think the matter is analogous to those cases where the protest concerned a bidder's failure to level price its bid.

In Keco Industries, Inc., 64 Comp. Gen. 48 (1984), 84-2 CPD ¶ 491, we held that a bidder's violation of the solicitation's level pricing provision was not dispositive as to the responsiveness of the bid; rather, the real question was whether this deviation worked to the prejudice of the other bidders. Thus, we concluded in that case that an unlevel low bid is not nonresponsive where the second low bidder conceivably could not have become low if it had been permitted to unlevel its bid "in the same manner." Keco Industries, Inc., 64 Comp. Gen. at 54, 84-2 CPD ¶ 491 at 9. We think the same standard to determine competitive prejudice applies here. Thus, in order to prevail in its argument, Kitco would have to show that its price proposal (the primary basis for award) would have been lower than Algonquin's if it also had been able to offer equal unit prices for the T-6 and T-73 modification kits.

However, Kitco has made no attempt to demonstrate that its offer would have become more advantageous than Algonquin's from a price standpoint if it had proposed equal unit prices for the kits, and our own analysis reveals no conceivable manner in which such a change in pricing would have improved Kitco's relative standing as an offeror.

Therefore, applying the analogous legal standard of Keco set forth above, we conclude that Algonquin's alleged failure to proportion fairly its unit prices with respect to the actual base costs of those items was immaterial to the propriety of the Air Force's ultimate source selection decision because it has not been shown to have bestowed any unfair competitive advantage upon the firm.

To the extent that Kitco may also be arguing that Algonquin's pricing structure rendered its offer materially unbalanced (Kitco apparently believes that Algonquin's higher unit prices in the base year mean that its offer is "front-loaded"), the argument is without foundation. In a negotiated procurement, an offer in which one element of the cost/price proposal carries a disproportionate share of the total cost or scope of the work plus profit (mathematical unbalancing) may create a reasonable doubt that acceptance of the offer will ultimately result in the lowest overall cost to the government (material unbalancing). See TLM Berthing, Inc., B-220623, Jan. 30, 1986, 86-1 CPD ¶ 111. Thus, where an offer is low overall but significantly "front-loaded" in the base year so that the offer does not become low until well into the option periods, the offer should not be accepted unless the agency is reasonably certain that the options will, in fact, be exercised. Id.

However, that legal principle is clearly inapplicable here because Algonquin's offer is low both in the base year and in each of the four option years. Therefore, even if the contract should not go the full 5-year term, acceptance of Algonquin's offer will ultimately result in the lowest cost to the government irrespective of the point at which the contract may eventually expire, and the firm's price proposal, accordingly, cannot be held to be materially unbalanced so as to preclude its acceptance. See Mobilease Corp., 54 Comp. Gen. 242 (1974), 74-2 CPD ¶ 185.

As to the Air Force's actual needs and the evaluation of proposals in light of those needs, the Air Force strongly disputes Kitco's contention that the T-6 and T-73 structural modification kits will have to have different configurations in order to meet the agency's requirements. The Air Force points out that the RFP contained no specifications that required the two kits to be designed differently. In fact, as the Air Force states:

> "Design is left up to each individual offeror, with the result that the [T-6 and T-73] kits could be configured exactly the same, similar, slightly different, widely different, or any variation in between."

We further note that there was no provision that offerors detail their proposed configurations for the kits. Instead, the RFP provided that technical proposals would be evaluated on the basis of: (1) past performance; (2) understanding of directions and specification requirements; (3) soundness of proposal approach; and (4) ability to meet the schedule.

Although Kitco may have configured the T-6 and T-73 kits differently, this does not serve to establish that the Air Force's evaluation of Algonquin's proposal as technically acceptable was unreasonable simply because Algonquin may have configured the kits the same. See APEC Technology Ltd., B-220644, Jan. 23, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ 81. The protester clearly bears the burden to show that the agency's evaluation was unreasonable, see Magnavox Advanced Products and Systems Co., B-215426, Feb. 6, 1985, 85-1 CPD ¶ 146, and, in our view, Kitco has not met that burden here. Although Kitco has provided a breakdown of the various subkits which are to be used to configure the T-6 and T-73 kits, and Kitco employs that breakdown in an effort to show that the two kits require different parts, it is the Air Force's position that Kitco's analysis only represents the firm's own idea of what configurations will meet the government's requirements. (The Air Force states that its engineering and technical personnel have indicated that the T-6 and T-73 kits would, in fact, be very similar.) In the Air Force's view, since there were no existent kit models to determine whether Kitco's configurations would be correct and Algonquin's incorrect prior to trial installation in the aircraft, all that was required for a finding of technical acceptability was that the proposals demonstrate the offerors' capability to research the government's data and design the kits, rather than a precise showing of what parts the kits would eventually contain. Contrary to Kitco's assertion, we see nothing in the record to show that the Air Force disregarded the RFP's evaluation criteria in determining Algonquin's proposal to be technically acceptable.

Moreover, the source selection decision was consistent with the RFP's stated basis for award, that is, that the successful firm would be that technically acceptable and responsible offeror submitting the lowest price proposal. The RFP also advised that the award might be made on the

basis of initial proposals, without discussions. Accordingly, since Algonquin's proposal was found to be technically acceptable and the firm was determined to be a responsible prospective contractor (infra), the award was properly made where acceptance of the firm's initial offer without discussions[5/] resulted in the lowest overall cost to the government. See 10 U.S.C.A. § 2305(b)(4)(A)(ii) (West Supp. 1985).

To the extent Kitco now asserts that the Air Force should have used more specific technical criteria and, therefore, have employed a more complex evaluation scheme such as a relative technical scoring of the proposals, the assertion is clearly untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), require that protests based upon alleged improprieties that are apparent on the face of a request for proposals must be filed prior to the closing date for the receipt of initial proposals. CBM Electronic Systems, Inc., B-215679, Jan. 2, 1985, 85-1 CPD ¶ 7. Here, the proposal closing date was December 10, 1985. Since Algonquin did not raise the issue until it filed this protest with our Office more than a month later, the issue is dismissed.

With regard to Kitco's argument that the Air Force improperly determined Algonquin to be a responsible prospective contractor to perform the work, we think that this argument is nothing more than a continued assertion that Algonquin should not have been awarded the contract because of the manner in which the firm chose to configure and price the modification kits. Irrespective of Kitco's belief that this reflected Algonquin's lack of technical capability, it is well-settled that, by awarding the firm the contract, the Air Force determined Algonquin to be

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5/ Although award on an initial proposal basis is always conditioned by the absence of any written or oral discussions with any offeror, FAR, § 15.610(a)(3)(ii) (FAC 84-5, Apr. 1, 1985), clarifications to eliminate minor uncertainties or irregularities in an otherwise acceptable proposal, such as the additional information requested by the Air Force regarding one of Kitco's proposed subcontractors, are generally not viewed as constituting discussions so as to preclude an award on that basis. See Technical Services Corp., 64 Comp. Gen. 245 (1985), 85-1 CPD ¶ 152.

responsible.6/ FAR, 48 C.F.R. § 9.105-2(a)(1) (1984); Ameriko Maintenance Co., B-216247, Sept. 12, 1984, 84-2 CPD ¶ 287. This Office does not review affirmative determinations of responsibility absent a showing of possible fraud or bad faith on the part of procuring officials, or an allegation that definitive responsibility criteria were misapplied. Ameriko Maintenance Co., B-216247, supra.

Although Kitco has raised the allegation that the Air Force acted in bad faith in awarding the contract, we have found no evidence to support the charge. In order to show bad faith, a protester must submit essentially irrefutable proof that the contracting agency directed its actions with the specific and malicious intent to injure the firm. Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD ¶ 25.

Moreover, our review of the RFP reveals no provisions that could be construed as definitive responsibility criteria. Rather, we think that Kitco may have confused certain technical evaluation criteria with objective standards of responsibility. See Nations, Inc., B-220935.2, Feb. 26, 1986, 86-1 CPD ¶ ___. Hence, we will not review the affirmative determination of Algonquin's responsibility. In addition, although preaward surveys are often used by contracting officers in determining responsibility, they are not a legal prerequisite to an affirmative determination. Carolina Waste Systems, Inc., B-215689.3, Jan. 7, 1985, 85-1 CPD ¶ 22. Accordingly, we will not review the Air Force's decision not to conduct a preaward survey here.

Finally, whether or not Algonquin will provide the Air Force with structural modification kits that meet its needs is directly a matter of contract administration, since it appears that only the actual trial installation of the kits

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6/ Accordingly, Kitco's allegation that Algonquin submitted an unreasonably low offer (Kitco noting that Algonquin's price proposal is some 25 percent lower than the government's estimate) provides no legal basis to object to the award, since whether a firm will be able to meet the government's requirements at its offered price is clearly a matter of responsibility. See Pacific Bell, B-218571, May 7, 1985, 85-1 CPD ¶ 512. Moreover, as the solicitation here contemplated a firm-fixed-price contract rather than a cost-reimbursement-type contract, there was neither a need nor a requirement for the Air Force to conduct a cost realism analysis. Cf. Norfolk Ship Systems, Inc., B-219404, Sept. 19, 1985, 85-2 CPD ¶ 309 (involving the award of a cost-plus-fixed-fee contract).

in the aircraft will determine if Algonquin's kit configurations are correct for purposes of the modification effort. It is beyond the bid protest function of this Office to review matters of contract administration because our procedures are reserved for considering whether an award of a contract complies with statutory, regulatory, and other legal requirements, not with postaward performance. Northwest Forest Workers Assoc., B-217588, Jan. 24, 1985, 85-1 CPD ¶ 99.

Accordingly, the protest is denied in part and dismissed in part.

for Harry R. Van Cleve
General Counsel