DECISION

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

FILE: B-221335 DATE: April 30, 1986

MATTER OF: Greenleaf Distribution Services, Inc.

DIGEST:

1. If an agency reopens discussions with one offeror after best and final offers, it must conduct discussions with all offerors whose proposals are in the competitive range and issue an additional request for best and final offers.

2. Recovery of the costs of preparing a proposal and filing and pursuing a protest is inappropriate where the protester is afforded the opportunity to recompete under the same solicitation.

Greenleaf Distribution Services, Inc. protests the award of a contract to California Stevedore & Ballast Co. under request for proposals (RFP) No. DAHC24-85-R-0003, issued August 9, 1985 by the U.S. Army Military Traffic Management Command. The solicitation covered stevedoring and related terminal services at the Military Ocean Terminal, Oakland, California, and contemplated a fixed-price, indefinite-quantity contract for 2 years.

We sustain the protest.

Background

The Army sought proposals for the loading and unloading of ships, rail cars, barges, and trucks at the Oakland terminal. The solicitation, which stated that award would be made to the lowest responsible offeror, price and other factors considered, required submission of hourly rate schedules for longshoremen and other workers for straight time; detention, travel and minimum guaranteed time; and overtime and premium overtime. Specifically at issue here is the application of the cost of workmen's compensation insurance to the rates for overtime and premium overtime (Schedules IVA and IVB of the solicitation) and the impact of Greenleaf's inclusion or exclusion of this cost on its best and final offer.

The Army received five proposals, including one from Greenleaf, a small business; it then conducted discussions and requested best and final offers. While Greenleaf's initial proposal had included the cost of workmen's compensation insurance in its proposed overtime and premium overtime rates, its $9,143,253.67 best and final offer, submitted November 13, did not. Because of this and questions concerning two other areas of Greenleaf's cost proposal, the Army requested verification, by November 25, of Greenleaf's price. The Army's analysis indicated, among other things, that Greenleaf had a possible mistake that might result in an under-recovery of $279,410, should it be necessary to utilize the total number of overtime hours indicated in the solicitation.

Greenleaf advised the Army by letter of November 20 that due to errors in the two items not at issue here, its final offer should be corrected to $8,948,834.49. Greenleaf also advised the Army that after it had submitted its initial proposal, its insurance carrier had indicated that Greenleaf would not be charged for workmen's compensation insurance for overtime and premium overtime. Greenleaf therefore had deleted the cost from its best and final, and did not reinstate it in its response to the request for verification.

In an affidavit submitted with its comments on the agency report, Greenleaf alleges that the contracting officer stated that the Army would not accept Greenleaf's offer at the corrected price and would not award the contract to Greenleaf unless the cost of workmen's compensation insurance for overtime and premium overtime was applied to Schedules IVA and IVB. Greenleaf responded, according to the affidavit, that it was prepared to absorb the cost of such insurance if necessary, and that it would be willing to reduce its profit to maintain its corrected price if forced to include the cost of the insurance. Greenleaf maintains that the contracting officer reiterated that Greenleaf could only verify or adjust the items identified in the request for verification and could not otherwise revise its best and final offer. Greenleaf claims that, on the basis of the contracting officer's assertion that he could not accept Greenleaf's price as submitted, Greenleaf provided revised Schedules IVA and IVB by letter of November 22, stating that it had been misinformed as to the applicability of workmen's compensation to longshoremen and that it had changed the schedules after receiving accurate information from the California State Compensation Insurance Fund. Greenleaf's revised offer of $9,227,376.19 reflected the cost of workmen's compensation insurance for overtime and premium overtime.

The Army, per affidavit of the contracting officer, disputes Greenleaf's version of the facts and maintains that at no time did Greenleaf state that it would absorb the cost of workmen's compensation insurance in its profit. Moreover, the contracting officer asserts that at no time was Greenleaf directed to change its proposal to reflect the additional cost, nor was Greenleaf informed that failure to do so would result in rejection of its proposal. In fact, the Army states, until receipt of Greenleaf's November 22 letter, it had regarded its exchanges with Greenleaf as clarifications in accord with the procedures set forth in the Federal Acquisition Regulation (FAR) for correction of mistakes alleged before award. See FAR, 48 C.F.R. § 15.607(c) (1984). Upon receiving the letter, however, the Army determined that Greenleaf's revisions were so extensive that it was necessary to reopen discussions with the remaining offerors. The Army notified these offerors by telex of November 25 as to possible errors or deficiencies in their proposals and specifically offered them the opportunity to make changes in their best and final offers. The telex--which was not sent to Greenleaf--set a common cut-off date of December 2 for either the receipt of revised best and final offers or confirmation of the original offers. On December 10, the Army awarded a $9,092,941.02 contract to California Stevedore.1/

Greenleaf's Protest

Greenleaf contends that the Army pressured it into including the cost of workmen's compensation insurance in its Schedule IVA and IVB rates by indicating that its response to the request for verification would otherwise be rejected. Greenleaf further alleges that the Army refused to allow it to absorb the extra cost and stand by its November 20 offer, which would have been lower than that of California Stevedore. In addition, Greenleaf charges that the Army improperly reopened discussions with all other offerors and afforded them an opportunity to submit revised best and finals by December 2, but failed to give Greenleaf a similar opportunity.

Analysis

It is clear from the record that Greenleaf was never afforded an opportunity, equal to that of the other offerors, to submit a second best and final offer, and we sustain the protest on this basis.

1/ Because Greenleaf did not protest in time for our Office to notify the contracting agency until December 23, more than 10 calendar days after award, performance has continued during the pendency of the protest.

If discussions are reopened with one offeror after an agency's receipt of best and final offers, discussions must be conducted with and additional best and finals requested from all offerors whose proposals are in the competitive range. See FAR, 48 C.F.R. § 15.611(c); Aquidneck Management Associates, Ltd., B-219430, Aug. 1, 1985, 85-2 CPD ¶ 119; Mayden & Mayden, B-213872.3, Mar. 11, 1985, 85-1 CPD ¶ 290.

Discussions occur when an offeror is afforded an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of the firm's proposal. FAR, 48 C.F.R. § 15.610. Discussions are to be distinguished from a request for clarification that is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal, and from verification, which involves advising an offeror of a suspected mistake and requesting that the offeror affirm the accuracy of its proposed prices. If correction of a mistake requires reference to data outside the proposal in order to establish the existence of the mistake, then the correction of that mistake also constitutes discussions. FAR, 48 C.F.R. § 15.607(a) and (c)(5); Technical Services Corp., 64 Comp. Gen. 245 (1985), 85-1 CPD ¶ 152; Alchemy, Inc., B-207338, June 8, 1983, 83-1 CPD ¶ 621.

While we find that the Army correctly determined that discussions had occurred here, since Greenleaf's ultimate inclusion of the cost of insurance was based on information from its insurance carrier, we find that the failure to include Greenleaf among the offerors permitted to revise their best and final offers was improper. The Army's request for verification of Greenleaf's price dealt specifically with inclusion of the increased cost of workmen's compensation insurance (in addition to two other areas of concern) and required a response by November 25. It did not constitute a request for a second best and final offer from Greenleaf. In contrast, the Army notified all offerors except Greenleaf of the reopening of discussions and specifically afforded them the opportunity to revise their offers by December 2, or 7 days after the date given to Greenleaf for submission of its response to the request for verification. The Army acknowledges that Greenleaf did not have an opportunity to revise its proposal except within the parameters of the request for verification. Thus, Greenleaf did not have an opportunity to reduce its price if, as it now alleges, it wished to absorb the cost of the workmen's compensation insurance. In addition, there was no common cut-off date for receipt of revised best and finals that included Greenleaf.

The Army argues that Greenleaf was not prejudiced by its failure to offer the firm the chance to submit a revised best and final because Greenleaf was not coerced into changing its proposal to reflect the additional insurance cost.

We recognize that the facts are not clear in this case as to whether Greenleaf was pressured into changing its price to include the cost of workmen's compensation insurance in its response to the request for verification. However, every offeror within the competitive range has a right to change or modify its proposal, including price, for any reason whatsoever, so long as negotiations are still open. See, e.g., PRC Information Science Company, 56 Comp. Gen. 768 (1977), 77-2 CPD ¶ 11; The FMI-Hammer Joint Venture, B-206665, Aug. 20, 1982, 82-2 CPD ¶ 160. Moreover, we have recognized that it is not uncommon for offerors to lower their prices in later stages of negotiation, even when the government's requirements do not change. See Bell Aerospace Co., 55 Comp. Gen. 244 (1975), 75-2 CPD ¶ 168. Thus, regardless of whether Greenleaf was pressured, or thought it was pressured, into raising its proposal price to reflect the cost of the additional insurance, we cannot say with any assurance that Greenleaf, had it been given the opportunity to submit a revised best and final offer rather than merely to respond to the verification request, would not have restructured its proposal in some way and lowered its price. Thus, we cannot conclude that Greenleaf was not prejudiced by the Army's failure to afford Greenleaf an equal opportunity to revise its proposal in every respect, including price, when it reopened discussions with the other offerors. Accordingly, we sustain the protest.

Recommendation

We believe the appropriate course of action here is for the Army to reopen negotiations and allow the submission of revised best and final offers. If the evaluation results then warrant, the California Stevedore contract should be terminated for the convenience of the government. In recommending this possible termination, we have considered the factors set forth in our regulations: the seriousness of the procurement deficiency, the degree of prejudice to other offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of termination on the procuring agency's mission. See 4 C.F.R. § 21.6(b) (1985). The Army states that termination of the contract

would impose undue disruption and expense on the government in that a complete inventory of all cargo would have to be conducted at government expense. In addition, the agency states, removal of the awardee's material handling equipment, such as cranes, tractors, and forklifts, would be time-consuming and costly. The Army further indicates that cargo arriving at and departing from the Oakland terminal cannot be delayed since an accumulation of cargo and a backlog of ship and truck traffic would be costly and impracticable, as would be the rerouting of cargo to other facilities or ports.

Notwithstanding the possible problems, we find that the disruption and unquantified cost of termination projected by the Army do not outweigh the importance of compensating for the prejudice to the competitive system in general and to Greenleaf in particular. In this regard, should termination be necessary, we think the Army could avoid delay and traffic backlog by completing the cargo inventory before changing contractors. Moreover, it is not apparent why there could not be an orderly removal of the incumbent's equipment. (Indeed, while the record is silent on this point, it may be possible for the new contractor to use the equipment currently in use by the incumbent if, for example, the equipment is leased.)

Therefore, by letter of today to the Secretary of the Army, we are recommending that the Army reopen negotiations and provide the opportunity for submission of revised best and final offers and to terminate the existing contract for the convenience of the government if the evaluation warrants award to other than the incumbent. Under these circumstances, Greenleaf is not entitled to recover its proposal preparation or protest prosecution costs. See 4 C.F.R. § 21.6(e); The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 CPD ¶ 132.

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States