Mr Walker

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wilson Concepts of Florida, Inc.

File: B-224485

Date: November 14, 1986

DIGEST

Agency is not obligated to consider late offer to reduce price where record shows that agency had reasonable basis for not holding discussions and requesting best and final offers which would have permitted timely consideration of revised price.

DECISION

Wilson Concepts of Florida, Inc. protests the award by the Army Armament Munitions and Chemical Command to P.T.E. Incorporated of a contract for cover frames with rollers under request for proposals (RFP) No. DAAA09-85-R-1162. Wilson contends that the Army improperly awarded the contract on the basis of the offered prices contained in the initial proposals without conducting discussions.

We deny the protest.

The RFP was issued as a total small business set-aside on November 12, 1985. It requested that offerors submit a fixed price for the required items, both with and without first article approval. The RFP did not contain technical evaluation criteria nor did it require submission of technical proposals. However, the RFP incorporated by reference the "Contract Awards" clause, Federal Acquisition Regulation, 48 C.F.R. § 52.215-16 (1985). Section (c) of this provision expressly advised offerors that the government might award a contract "on the basis of initial offers received, without discussions," and that offerors should therefore include their best terms in their initial proposals.

The Army received seven offers in response to the RFP by the December 24, 1985, closing. The Army then began the task of determining which firm was the low, responsible offeror. Milo Components was the low offeror but was determined nonresponsible based upon a negative preaward survey. That determination was referred to the Small Business Administration (SBA) for consideration under the SBA's certificate of competency (COC) procedures. Milo declined to file for a COC and was therefore ineligible to receive award under the subject RFP.

A subsequent preaward survey to establish the responsibility of P.T.E., the second low offeror, resulted in a recommendation that no award be made to the firm because of previous contractor delinquencies and certain concerns regarding the firm's quality assurance program. The matter was referred to the SBA for a COC on March 25, 1986. Upon inquiry by SBA, the Army advised that no discussions with offerors were anticipated. Thus assured that P.T.E. was the offeror in line for award should a COC be granted, the SBA proceeded with its consideration of P.T.E.'s COC application and by message of April 30, informed the contracting officer of its intention to issue a COC to P.T.E.

By letter dated May 12, 1986, delivered to the contract specialist on that day, the protester, who was the fifth low offeror, advised the Army that it was in a position to lower its price to an amount which would have made Wilson the low offeror.[1/] The Army's contract specialist subsequently asked the SBA regional office if the SBA would delay the COC proceeding if the Army decided to conduct discussions and request best and final offers. The SBA regional office replied that it had processed P.T.E.'s COC application in reliance on the Army's advice that no discussions were to be conducted and that P.T.E. therefore was in line for award. Furthermore, the SBA stated, it had already communicated to the contracting officer its proposed issuance of the COC, and the contracting officer could appeal the SBA's decision to issue a COC to the SBA's Central Office.

The contracting officer decided there was no reason to conduct discussions and request best and final offers. On the basis of data which indicated to the contracting officer

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1/ The award eventually made to P.T.E. was for 774 pieces at a unit price of $227.44, including first article testing, for a total of $176,038.56. The revised prices offered by the protester represent a price reduction of approximately $6300 to $8500, depending on whether first article testing was waived.

that P.T.E. had an "ongoing problem" with missed delivery schedules, indicative of poor production management, which would only worsen with the award of additional contracts, the contracting officer prepared an appeal of the COC determination for the consideration of the Army Command. The Army Command returned the appeal papers without action because the Army Command decided the appeal did not contain sufficient evidence to be successful. A COC was issued by the SBA on June 23, and award was made to P.T.E. on July 3.

Wilson complains that the Army's decision to award the contract without discussions was arbitrary, and did not result in the best possible prices for these items. In its view, the agency should have conducted discussions and given each offeror an opportunity to submit best and final offers since the protester had submitted a revised price proposal which was lower than the price at which the contract subsequently was awarded. Wilson alleges that the firm was able to revise its unit prices because the company had received another contract to manufacture these items.

With regard to its decision not to consider Wilson's revised price proposal, the Army contends that the standard "Late Submissions, Modifications and Withdrawal of Proposals" clause, incorporated by reference in the RFP, requires the rejection of any proposed modification submitted after the due date for initial proposals unless it is in response to a request for best and final offers. Thus, the Army maintains that Wilson's proposed modification was late and the contracting officer was not obligated to consider it unless the modification contained a "potentially significant proposed price reduction."

The agency advances other reasons why conducting negotiations after receipt of the protester's revised price proposal was not in the best interests of the government. The Army states that Wilson's proposed price, which was less than 5 percent below that at which the contract was awarded and was submitted approximately 5 months after the date for receipt of proposals, would not result in the lowest overall cost to the government because of the time and expenses already incurred by the agency and the potential disruption to the procurement process if discussions were held.

In its comments on the agency's report, Wilson acknowledges that the decision to open negotiations based on its proposed price reduction is discretionary. However, the protester believes it was unreasonable and improper for the agency to consider the "undefinable" costs associated with the "time it might take to continue the evaluation process." In addition,

Wilson alleges that any disruptive effect occasioned by the time spent to conduct negotiations would be "minimal."

We find no merit in the protester's assertion that award to P.T.E., without discussions, was improper. Under the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1985), a contracting agency may make an award on the basis of initial proposals where the solicitation advises offerors of that possibility, and the competition or prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government. Consolidated Bell, Inc., B-220425, Mar. 11, 1986, 86-1 C.P.D. ¶ 238.

Here, the Army received seven proposals and found that award to P.T.E. would result in the lowest overall cost. Wilson's offer to reduce its price was a late offer which the Army was not obligated to consider. See Gemma Corp., B-218389.2, Aug. 30, 1985, 85-2 C.P.D. ¶ 252. We have no basis upon which to disagree with the Army's decision not to conduct discussions. As already noted, award had been delayed 5 months from the closing date for receipt of initial proposals because of the proceedings to determine the responsibility of the two low offerors prior to receipt of Wilson's price reduction. The agency had incurred delays associated with two preaward surveys and referrals to the SBA which, in addition to the uncertainty as to what further proceedings might be necessitated at the conclusion of discussions, outweighed any potential savings that could be realized from the protester's slightly lower revised unit prices. Under these circumstances, we think the agency's decision to award on the basis of initial offers was proper.

Finally, we note that in its comments on the agency report, the protester alleges that the contracting officer failed to include in his appeal letter any "of the new information" which arguably would have persuaded the department to appeal the proposed issuance of the COC and would have permitted suspension of the award to P.T.E. until negotiations were conducted. The protester asserts that the contracting officer's appeal "was only a reiteration of the negative preaward [survey]."

The protester does not specify what "new information" it believes the contracting officer omitted; moreover, its assertion that the contracting officer only reiterated the findings of the preaward survey team is inaccurate because the record shows that he also forwarded a memorandum "detailing additional problems confronted by [P.T.E.] since the preaward survey." In any event, the Army made the discretionary decision not to pursue an appeal under the

circumstances of this procurement. We have no basis to conclude that the procedure was "flawed," as the protester suggests, in any legally objectionable way.

The protest is denied.

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Harry R. Van Cleve
for General Counsel