The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Inter-Continental Equipment, Inc.

File: B-224244

Date: February 5, 1987

DIGEST

1. Since the agency's technical evaluation in a negotiated procurement is based upon information submitted with the proposal, the burden is on the offeror to submit an adequately written proposal from the outset. Where protester's alternate proposal fails to include technical information that is called for by the solicitation and is necessary to establish compliance with the specifications, there is a reasonable basis to find the protester's proposal technically unacceptable.

2. An agency is not required to reopen discussions after receipt of best and final offers to determine the acceptability of a deficient alternate proposal first submitted with the best and final offer.

3. The General Accounting Office does not consider whether an offeror qualifies as a manufacturer under the Walsh-Healey Act.

4. Protest that modification to the delivery terms of a contract eliminating the contractor's obligation to ship items on U.S.-flag vessels is denied where there is no evidence that the modification was planned before contract award; the contractor's obligation is substantially unchanged; and the competitive position of the protester would not have changed if the solicitation had contained the modified delivery terms.

DECISION

Inter-Continental Equipment, Inc. (ICE) protests the award of a contract to Transtac Management Corporation under request for proposals (RFP) No. N00033-86-R-3065, issued by the Military Sealift Command, Department of the Navy, for dry cargo containers to be used on Maritime Prepositioning Ships. ICE protests the rejection of its alternate proposal for failing to contain sufficient technical information to establish compliance with the specifications.

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We deny the protest in part and dismiss it in part.

BACKGROUND

The solicitation, issued on June 6, 1986, provided that award would be made to the lowest-priced, technically acceptable offeror. The Navy received nine proposals by the closing date and determined that seven were in the competitive range. Several offerors, including ICE, were found to have included insufficient technical information in their proposals for the Navy to determine compliance with the specifications. The agency conducted oral discussions and requested that best and final offers be submitted by August 20. In response to the Navy's concerns, ICE submitted drawings of its proposed containers prepared by a subcontractor. Although the drawings contained the subcontractor's proprietary legend restricting reproduction or disclosure, ICE stated that the drawings would be provided to all of its subcontractors and that containers supplied to the Navy would conform to the drawings.

Shortly after receipt of the revised offers, the Navy terminated for default another contract for similar cargo containers. The solicitation was modified to add the undelivered containers from the defaulted contract, and additional best and final offers were requested by September 5. ICE included with its second best and final offer an alternate proposal for cargo containers assembled in the United States from parts produced in Korea. The firm's basic proposal was for containers entirely manufactured by subcontractors in Europe. ICE provided no technical information or drawings with its alternate proposal.

Although ICE's alternate proposal offered the lowest price, the Navy concluded that it could not determine whether the proposal was technically acceptable because of the omission of technical information, and that the agency's requirement for timely delivery would not permit another round of discussions.

On September 16, the Navy awarded a contract to Transtac Management Corporation, the lowest-priced, technically acceptable offeror. ICE's basic proposal offered a higher price than Transtac and is not at issue in this protest. ICE argues that because its basic proposal was technically acceptable, it was unreasonable for the Navy to reject the alternate proposal. According to the protester, the Navy should have assumed that the technical drawings included in the basic proposal were equally applicable to the alternate

proposal. Consequently, ICE contends the alternate proposal meets all of the requirements of the solicitation and should have been accepted.

ANALYSIS

As discussed above, in its basic proposal the protester offered to import completed containers manufactured by several European concerns. The alternate proposal offered to obtain components from Korean suppliers for assembly by the protester or another subcontractor in the United States. The technical information in ICE's basic proposal, prepared by a planned European subcontractor, evidenced what ICE planned to require of its subcontractors--fully manufactured cargo containers. The information largely consisted of elevation drawings of the completed item.

In our view, the Navy correctly understood the alternate proposal to represent a substantially different means of contract performance. In a negotiated procurement, it is an offeror's obligation to establish that what it proposed will meet the government's needs. ASEA, Inc., B-216886, Feb. 27, 1985, 85-1 CPD ¶ 247. The RFP expressly stated that technical information was required to determine compliance with the specifications, and ICE was told during discussions that technical drawings would be required. The only technical information in the Navy's possession arguably applicable to ICE's alternate proposal consisted of drawings of a completed end item included with ICE's basic proposal. We cannot say that the Navy's judgment that it could not determine the acceptability of ICE's alternate proposal without specifically applicable technical information was unreasonable, and, for this reason, we deny this basis of the protest. See Micronesia Media Distributors, Inc., B-222443, July 16, 1986, 86-2 CPD ¶ 72.

ICE argues that the Navy's grounds for not discussing the deficiency in the alternate proposal--an urgent requirement for cargo containers--is unsupportable. An agency is not required to reopen discussions when a deficiency is first introduced in a best and final offer in order to provide a firm with an opportunity to revise its proposal. International Imaging Systems, B-224401, Sept. 15, 1986, 86-2 CPD ¶ 302. While an offeror may modify its earlier proposal in its best and final offer, in doing so it assumes the risk that any change it makes might result in the rejection of its proposal, rather than in further discussion, if the agency

finds the revised proposal unacceptable. Xerox Special Information Systems, B-215557, Feb. 13, 1985, 85-1 CPD ¶ 192. It is up to the procuring agency to decide when the negotiation and offer stage of a procurement will conclude, and we do not find that the Navy abused its discretion by failing to reopen discussions. While these rules generally apply in cases where an offeror has submitted a single proposal similar to the protester's basic proposal here, we see no reason why they should not also apply to an alternate proposal that is submitted for the first time with a best and final offer.

After ICE's final submissions to our Office regarding its initial protest, the firm raised a number of additional issues. ICE contends that the Navy has unreasonably delayed deciding an agency-level protest concerning Transtac's eligibility for award under the Walsh-Healey Act. Agency determinations regarding the Walsh-Healey Act are reviewed by the Department of Labor and not under our bid protest function, Shelf Stable Foods, Inc., B-222919, June 24, 1986, 86-1 CPD ¶ 586, and we dismiss this ground of ICE's protest.

The protester argues that the Navy has also delayed deciding a protest that Transtac has violated the Cargo Preference Act of 1954 by not shipping cargo containers on U.S.-flag vessels. Additionally, the protester complains that the Navy has mooted this protest issue by agreeing to modify Transtac's contract to change the delivery terms from f.o.b. destination, Albany, Georgia to f.a.s. vessel, Naples, Italy, so that the contractor is no longer obligated to ship the containers on U.S.-flag vessels.

This issue is also generally not within our bid protest jurisdiction because it concerns contract administration. Intercontinental Equipment, Inc., B-224824, Oct. 19, 1986, 86-2 CPD ¶ 424, aff'd on reconsideration, B-224824.2, Nov. 12, 1986, 86-2 CPD ¶ 556. ICE argues, however, that this modification constitutes a "cardinal change," essentially a new contract, for which the Navy was required to obtain competition.

The integrity of the competitive bidding system precludes an agency from awarding a contract competed under given specifications with the intent of changing to materially different specifications. U.S. Materials Co., B-216712, Apr. 26, 1985, 85-1 CPD ¶ 471. Also, a modification that is outside of the scope of the original contract should be the subject of a new procurement unless a sole-source award was appropriate. Indian and Native American Employment and Training Coalition, 64 Comp. Gen. 460 (1985), 85-1 CPD ¶ 432.

We have no evidence that the modification of delivery terms here was contemplated before contract award, and we disagree with ICE that the modification exceeded the scope of the contract. The "Changes-Fixed Price" clause in the contract, 48 C.F.R. § 52.243-1 (1985), specifically provides agencies with authority to unilaterally change the place of delivery. In this case, the modification was agreed to by both parties, and the Navy received consideration in the form of a decrease in contract price. Under the contract Transtac still must provide the identical cargo containers that it included in its proposal; it merely must deliver them to a different location. The record filed with our Office contains no evidence that the Navy intended to avoid competition by its action, or that, had the solicitation provided for delivery f.a.s. Naples, Italy, the competitive position of the protester would have materially changed. Consequently, we deny this basis of protest.

We deny the protest in part and dismiss it in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel