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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Environmental Tectonics Corporation
File: B-225474
Date: February 17, 1987

DIGEST

1. Protest is sustained where the agency improperly awarded the contract to an offeror which failed to delete certain material qualifications from its proposal until after the closing date for receipt of best and final offers, even though the agency had earlier determined and expressly advised the firm that its offer would not be acceptable unless the qualifications were withdrawn.

2. A late proposal modification resulting from an agency's request for best and final offers may be accepted only if the late receipt is due solely to government mishandling or if the late modification makes the terms of an otherwise successful proposal more favorable to the government. The term "otherwise successful" means that the government may accept a favorable late modification only from the firm already in line for the contract award.

DECISION

Environmental Tectonics Corporation (ETC) protests the award of a contract to CACI, Inc. - Federal under request for proposals (RFP) No. N62477-85-R-0295, issued by the Department of the Navy. The procurement was for services to overhaul the PVA-2 hyperbaric facility at the Naval Diving and Salvage Training Center, Panama City, Florida. ETC complains that the award was improper because the Navy failed to conduct meaningful competitive range discussions with the firm.

We sustain the protest on another ground.

Three firms, CACI, ETC, and Astro Pak, submitted technical and cost proposals in response to the RFP by the July 30, 1986 closing date for receipt of initial offers. CACI's proposal received the highest technical point score, and its initial proposed cost was the lowest. The Navy determined that none of the proposals contained technical weaknesses or deficiencies to the extent that comprehensive discussions

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were required. By letter of September 15, the Navy advised all three firms that their proposals were within the competitive range and requested the submission of best and final offers by September 22.

It is apparent from the record that any revisions to the proposals were limited to cost matters only. Astro Pak's offer remained unchanged, whereas CACI increased its proposed cost and ETC slightly reduced its cost. Accordingly, ETC now displaced CACI as the low offeror by a small margin. However, consistent with section M of the RFP, which provided that the technical evaluation factors were more important than cost considerations on a 60/40 ratio, the Navy determined that the technical superiority of CACI's proposal outweighed its slightly higher cost, and the Navy awarded the firm the contract on September 30. We note that CACI's technical point score advantage was in large measure due to the high ratings given the firm by the Navy's evaluators in the area of corporate experience, since CACI had earlier successfully reworked the PVA-1 hyperbaric facility at the same installation.

Following its debriefing as an unsuccessful offeror, ETC filed this protest against the award to CACI on the ground that the Navy failed to conduct meaningful competitive range discussions with the firm so as to give it an opportunity to improve its offer. In this regard, ETC learned during the debriefing that one of the Navy's principal concerns, which served to limit the number of evaluation points the proposal received, was ETC's relative lack of experience in overhauling hyperbaric facilities. ETC contends that if this perceived weakness had been made known to the firm through discussions, it would have been able to improve this aspect of its proposal by submitting more detailed information concerning its previous performance of a similar project for a foreign government.

We need not decide the express issue raised by ETC because we conclude from our scrutiny of the record that the award to CACI was improper on a more fundamental ground.

The records show that CACI submitted with its July 30 initial proposal an attachment entitled, "Terms, Conditions and Assumptions," in which the firm indicated, in part, that it was imposing additional conditions on the government and taking exception to certain solicitation provisions. For example, although the RFP provided that the contractor was to install and maintain all necessary temporary utility connections and lines "at his own expense," CACI proposed that electrical utilities be provided by the government with power

to be furnished "within seven days of the contractor's request." Similarly, CACI proposed that the RFP requirement for the contractor to provide the same 1-year warranty for replacement parts as for parts initially delivered under the contract "[be stricken] in its entirety."

The Navy expressly determined that CACI's attachment to its July 30 initial proposal sought to impose terms and conditions which were either inconsistent with or in direct conflict with the RFP requirements. Accordingly, in its September 15 request for a best and final offer from the firm, the Navy advised CACI that it regarded the terms and conditions as "inappropriate" qualifications to CACI's proposal. The firm was specifically asked "to withdraw, in its entirety, these conditions." The Navy further cautioned CACI that failure to withdraw the qualifications "will render your proposal unacceptable and [it] will not be considered for award. . . ." The Navy's letter noted that the closing date for receipt of best and final offers was September 22 and further advised that any submitted modifications would be subject to clause L.13 of the RFP.

In this regard, clause L.13 incorporated the provisions of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.215-10 (1985), governing the late submission of proposals and proposal modifications. Specific to this case, paragraph (c) of that section provides that, with respect to a negotiated procurement, a proposal modification resulting from the contracting officer's request for a best and final offer which is received after the specified closing time and date is not to be considered unless the modification is received before award and the late receipt is due solely to mishandling by the government after receipt at the government installation.

The solicitation documents filed with the Navy's administrative report show that CACI did not withdraw the qualifications created by its July 30 proposal attachment until after the September 22 closing date for receipt of best and final offers. In fact, CACI only withdrew the nonconforming terms and conditions by a letter to the contracting activity dated September 30, the same day that the contract was awarded to the firm. Although this letter conceivably may have been received by the agency on September 30 prior to award (the letter bears no time/date stamp), it is obvious from the September 30 date and the present tense language usage--"CACI . . . Hereby withdraws its exceptions . . ."--that the letter neither was submitted with the firm's September 22 best and final offer nor was merely the confirmation of an earlier notification of withdrawal.

Accordingly, it is also clear from this fact that the exception provided by the FAR, 48 C.F.R. § 52.215-10(c), supra permitting the acceptance of a late modification resulting solely from government mishandling, is not applicable here. See Potomac Systems Resources, Inc., B-219896, Oct. 8, 1985, 85-2 CPD ¶ 393; Radva Corp., B-219595, July 26, 1985, 85-2 CPD ¶ 101.

We also note that the FAR, 48 C.F.R. § 52.215-10(f), provides another exception which allows for the consideration of a late modification when the modification makes the terms of an otherwise successful proposal more favorable to the government. In this limited instance, the late modification may be considered and accepted at any time it is received.

However, it is well-settled that the term "otherwise successful" restricts this exception to permit the government's acceptance of a late modification offering more favorable terms only from the offeror already in line for the contract award. Tyler Construction Corp., B-221337, Mar. 19, 1986, 86-1 CPD ¶ 271; Blue Cross of Maryland, Inc., B-194810, Aug. 7, 1979, 79-2 CPD ¶ 93. Here, if we construe CACI's withdrawal letter of September 30 as a proposal modification offering better terms to the government, CACI was not the "otherwise successful" offeror at the time the Navy received that letter because, under the Navy's own earlier determination, CACI's proposal would not be considered for award unless the unacceptable terms and conditions created by its July 30 proposal attachment were deleted. However, since those qualifications were not withdrawn by September 22, the closing date for receipt of best and final offers, the firm's proposal remained unacceptable at the time the late modification which sought to remove them was received. For that reason, CACI properly could not be viewed as the firm already in line for the award on September 30, and, in consequence, there was no ground under FAR, 48 C.F.R. § 52.215-10(f), supra, for the Navy to accept the firm's withdrawal letter of that date. See Tyler Construction Corp., B-221337, supra; see also Woodward Assocs., Inc. et al., B-216714, et al., Mar. 5, 1985, 85-1 CPD ¶ 274; Windham Power Lifts, Inc. et al., B-214287, Mar. 7, 1984, 84-1 CPD ¶ 278.

We conclude that the Navy erred in awarding the firm the contract on the basis of what the agency itself had determined and expressly advised the firm would be an unacceptable offer if not modified as directed. Although we recognize that we are sustaining the protest on a ground not raised by the protester, it is readily apparent that ETC

itself could not have learned of this basis in the absence of any indication that the documents in question were ever made available to the firm.

Accordingly, by separate letter today, we are recommending to the Secretary of the Navy that discussions now be reopened with the competitive range offerors. If CACI is not the successful offeror at the conclusion of these discussions, we further recommend that the firm's contract be terminated for the convenience of the government.

The protest is sustained.

for 
Comptroller General
of the United States