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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Loral TerraCom--Request for Costs

File: B-224908.6

Date: September 15, 1987

DIGEST

Where the General Accounting Office finds that the protester has not been unreasonably excluded from competing in the procurement, the award of proposal preparation and protest costs is inappropriate.

DECISION

Loral TerraCom requests reimbursement of its proposal preparation and protest costs pursuant to our decision in The Aydin Corporation; Department of the Army--Request for Reconsideration, B-224908.3; B-224908.4, May 19, 1987, 87-1 CPD ¶ 527, in which we affirmed a previous decision sustaining the protest of Marconi Italiana against the Army's award of a contract to Aydin Corporation under request for proposals (RFP) No. DAAB07-86-R-J006.

We deny Loral's request for costs.

This is our third decision in this matter. Our first decision, Loral Terracom; Marconi Italiana, B-224908; B-224908.2, Feb. 18, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 182, was in response to protests filed by Marconi and Loral in which both firms argued that the Army had failed to conduct meaningful discussions before making award to Aydin. Loral also argued that it had been improperly found to be nonresponsible by the Army. In addition, Marconi argued that the Aydin proposal failed to technically conform to the requirements of the solicitation in one crucial aspect. It is upon this latter basis that the protest of Marconi was sustained. We therefore recommended that the Army reopen negotiations and terminate for the convenience of the government the contract awarded to Aydin, if, after the renewed negotiations, it appeared that another offeror was properly in line for award. Significantly, we did not reach the merits of the remaining arguments and accordingly did not reach the merits of Loral's protest; we stated in our original decision that we deemed it unnecessary to reach the merits of Loral's protest since, by virtue of Marconi's success in its protest, Loral would be afforded an opportunity to participate in the reopened negotiations.

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Subsequently, the Army and Aydin requested reconsideration of that initial decision and specifically urged us to either reverse our original holding on the merits or, failing that, modify our original recommendation so as not to include the recommendation of renewed negotiations. In our second decision, The Aydin Corporation; Department of the Army--Request for Reconsideration, B-224908.3; B-224908.4, supra, we affirmed our original holding sustaining Marconi's protest but withdrew our recommendation for renewed negotiations on the ground (advanced by the Army) that renewed negotiations were not in the best interest of the government because of the urgency of the requirement. We nevertheless awarded proposal preparation and protest costs, including attorney's fees, to Marconi on the ground that the firm had been unreasonably excluded from competing for award under the solicitation. Loral now asks that we award the firm proposal preparation and protest costs since, by modifying our original recommendation to reopen negotiations, Loral was never afforded another opportunity to obtain the award and since the firm was initially unreasonably excluded from the competition by the Army.

The Army argues, however, that we must now decide the merits of Loral's original protest before reaching the issue of costs since we never expressly ruled that Loral was unreasonably excluded from the competition which is a prerequisite to award of costs. 4 C.F.R. § 21.6(e) (1986). We agree with the Army that it is appropriate to consider the merits prior to reaching the issue of costs.

In its initial protest, Loral principally argued that "[a]t no time did the contracting agency ever identify to [Loral] any deficiency in its proposal or its subsequent submission." Our review of the record indicates that Loral's allegations are without foundation.

Of particular importance in the technical evaluation of Loral's proposed design was a unique feature of Loral's radio; the Loral design included a "mast-mounted RF module" (RF module). Although the Army also found Loral's best and final offer technically unacceptable on one other ground as well, the technical evaluation team concluded that the RF module posed an unreasonable risk. Specifically, the technical evaluation team was concerned with the thermal dispersion qualities of the RF module when operating the Loral radio under extreme temperature conditions. According to Loral, there was no risk associated with this feature of its radio but that, because of the Army's failure to conduct meaningful discussions with the firm, it was unable to demonstrate this to the satisfaction of the technical evaluation team.

We believe that the Army conducted adequate discussions with Loral. The Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(b) (1986), provides that the content and extent of competitive negotiations is a matter of judgment to be exercised by the contracting officer based on the particular facts at hand. The contracting officer should advise an offeror of deficiencies in its proposal so that they may be corrected, but should not engage in technical leveling--that is, helping an offeror to bring its proposal up to the level of the other proposals through successive rounds of discussions, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence or inventiveness in preparing its proposal. FAR, 48 C.F.R. § 15.610(d); Creativision, Inc., B-225829, July 24, 1987, 66 Comp. Gen. ____, 87-2 CPD ¶ 78.

The record shows that Loral was afforded an adequate opportunity, within the framework of the original discussions, to address the technical concerns of the Army. During written discussions, the Army explicitly requested that Loral provide a thermal analysis of the RF module. We believe that this question reasonably should have led Loral into this area of its proposal which the Army found technically deficient. Further, oral discussions were held after the written questions were propounded to Loral and Loral was at that time afforded an opportunity to make inquiries regarding the original written questions. However, Loral failed to satisfy the government's concerns in the thermal analysis area and the evaluators, during the final evaluation of best and final offers, found that Loral did ". . . not provide sufficient analysis to show that the mast mounted circuitry . . . can be kept from overheating from the combination of power dissipation and solar radiation." We agree with the Army that this deficiency was brought to Loral's attention during discussions. Consequently, we believe that meaningful discussions were held with Loral and that therefore Loral has not shown its proposal was improperly rejected.

Where an agency properly determines that a particular proposal is technically unacceptable based on information contained in the offeror's best and final offer, it is not required to reopen negotiations to permit the offeror to demonstrate the merits of its proposal. Digital Devices, Inc., B-225301, Mar. 12, 1987, 87-1 CPD ¶ 278. Further, we have held that even if a proposal is initially determined to be within the competitive range, the contracting agency is not required to hold discussions with an offeror once it is determined that its proposal is outside the acceptable range and can exclude firms initially determined to be within the competitive range from further award consideration after

their revised proposals are found to be technically unacceptable and no longer within the competitive range. See 52 Comp. Gen. 198, 208 (1972). Therefore, since we find that Loral was not unreasonably excluded from the procurement, we deny its request for costs. To the extent this decision is inconsistent with out original holding that all offerors including Loral should be allowed to participate in any renewed discussions, we modify that decision.

Harry R. Van Cleve

for Comptroller General
of the United States