Protocols

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Consolidated Engineering, Inc.

File: B-228142.2

Date: January 13, 1988

DIGEST

1. In a negotiated procurement, an initial proposal that failed to comply with solicitation's bid bond requirement may be included in the competitive range where the agency concludes that the proposal was reasonably susceptible of being made acceptable through discussion.

2. The fact that an agency originally rejected an initial proposal when the agency sought to make awards based upon initial proposals does not preclude the agency from later including that proposal within the competitive range when the agency decided to reopen the competition.

DECISION

Consolidated Engineering, Inc., protests the award of a contract to Automation Specialties, Inc., under request for proposals (RFP) No. F24604-87-R0009, issued by the Department of the Air Force. Consolidated argues that Automation's proposal failed to comply with a material solicitation requirement and should have been rejected. In addition, Consolidated contends that Automation's initial proposal was rejected by the Air Force and could not later be included in the competitive range, allowing Automation to submit a best and final offer.

We deny the protest.

The RFP, a 100 percent small business set aside, sought offers for electrical construction services at various Minuteman missile launch facilities. The solicitation required the submission of bid and performance bonds.

On the basis of the initial proposals received, the Air Force concluded that the apparent successful offerors were Automation at four facilities and Mid-State Enterprises, Inc., at two facilities. The Air Force, however, found

Automation's proposal to be technically unacceptable because it had submitted a defective power of attorney in support of its bid bond and had failed to correct the power of attorney within the time allowed by the contracting officer. The Air Force then determined that it would award all six facilities to Mid-State. Mid-State, however, was found to be a large business and ineligible for award as a result of a Small Business Administration size protest.

The Air Force concluded that it would place the remaining offerors within the competitive range and conduct discussions. Automation filed a timely, agency protest against the Air Force decision to exclude it from the competitive range.1/ The Air Force sustained Automation's agency-level protest and placed Automation's proposal in the competitive range.

Best and Final Offers were solicited and received from the remaining offerors, including Automation and the protester. Automation's best and final offer included a corrected power of attorney and proper bid bond. After evaluation of best and final offers, the Air Force determined that Automation was the low offeror at five facilities and Enterprise Electric, Inc., was the successful offeror at one facility. After receiving notice of the proposed awards, Consolidated timely filed this protest against the award to Automation.2/

Consolidated contends that the Air Force could not include Automation's proposal in the negotiations because its initial proposal had failed to comply with a material solicitation term. In addition, Consolidated argues that once the Air Force had rejected Automation's proposal it could not later decide to include it in the competitive range. We find both arguments to be without merit.

1/ Automation also filed an untimely protest, B-228142, with our Office which we summarily dismissed on September 10, 1987.

2/ The Air Force contends that Consolidated failed to file its protest within 10 working days after it knew or should have known the basis of its protest. The Air Force, however, in its calculation of working days neglected to exclude Columbus Day which was a federal holiday. Consolidated filed its protest on the tenth day after notice of the basis of its protest and is timely.

It is true that provisions requiring the submission of a bid bond are considered material terms in a solicitation and that the Federal Acquisition Regulation (FAR) requires the rejection of a bid or offer which fails to comply with a bid bond requirement. See FAR, 48 C.F.R. § 28.101-4 (1986). The Air Force recognized this requirement when it found Automation's initial proposal technically unacceptable. However, Consolidated is incorrect in its assertion that a procuring agency in a negotiated procurement, having found an offer technically unacceptable for failure to comply with a bid bond requirement, has no discretion to include that offer in the competitive range for the purpose of conducting negotiations.

The purpose of a competitive range determination in a negotiated procurement is to select those offerors with which the contracting agency will hold written or oral discussions. FAR, 48 C.F.R. § 15.609(a); S&Q Corp., B-219420, Oct. 28, 1985, 85-2 C.P.D. ¶ 471. We have consistently defined the competitive range as consisting of all proposals that have a "reasonable chance" of being selected for award, that is, as including those proposals which are technically acceptable as submitted or which are reasonably susceptible of being made acceptable through discussions. Information Systems & Networks Corp., B-220661, Jan. 13, 1986, 86-1 C.P.D. ¶ 30; Fairchild Weston Systems, Inc., B-218470, July 11, 1985, 85-2 C.P.D. ¶ 39. The FAR, 48 C.F.R. § 15.609(a), mirrors this definition and provides that if doubt exists as to whether a proposal is in the competitive range, the proposal should be included. This is consistent with the over-riding mandate of the Competition in Contracting Act of 1984 that military agencies obtain "full and open competition" in their procurements. 10 U.S.C. § 2304(a)(1)(A) (Supp. III 1985). Thus, as a general rule, an agency should endeavor to broaden the competitive range since this will maximize the competition and provide fairness to the various offerors. See Cotton & Co., B-210849, Oct. 12, 1983, 83-2 C.P.D. ¶ 451. Furthermore, the determination of whether a proposal is in the competitive range is principally a matter within the contracting agency's reasonable exercise of discretion. Tracor Marine, Inc., B-222484, Aug. 5, 1986, 86-2 C.P.D. ¶ 150.

We find the procuring agency's actions in this procurement to be reasonable. When the Air Force determined that it would award contracts based upon initial proposals, it properly concluded that it could not accept Automation's defective proposal. However, when the Air Force decided to reopen the competition it could reasonably conclude that Automation's proposal was susceptible of being made acceptable through discussions and should be included in the

competitive range. Such an action comported with its statutory requirement to maximize competition and is in the best interests of the government.

Consolidated also argues that since Automation's initial proposal was not a "complete" offer which could be accepted by the government without discussion that the initial proposal could not be included in the competitive range. However, as noted above, the competitive range is comprised of those proposals which are technically acceptable and those which are reasonably susceptible of being made acceptable through discussions. Information Systems & Networks Corp., B-220661, supra.

We also find no merit in Consolidated's argument that once the Air Force rejected Automation's initial proposal that the Air Force then had no discretion to include the Automation proposal in the competitive range. Consolidated reasons that since a best and final offer is a modification of an offeror's initial proposal, once Automation's initial proposal was rejected Automation's best and final offer could not be a modification by a new offer. However, once the Air Force decided to reopen the competition, it allowed Automation to revive its offer in order to participate in the competition. Automation and the other offerors, including the protester, were given the opportunity to revise their offers and submit best and final offers. We do not find that the Air Force's actions violated the law or regulation.

The protest is denied.

James F. Hinchman
General Counsel