



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kaufman Lasman Associates Inc.; Larry Latham
Auctioneers, Inc.
File: B-229917; B-229917.2
Date: February 26, 1988

DIGEST

Contracting agency's decision in response to protest challenging award on initial proposal basis to open discussions and request best and final offers from all offerors in competitive range and, if warranted, terminate awardee's contract, is appropriate even though one offeror received detailed debriefing after initial award was made, since agency properly concluded that award based on initial proposals was improper because it was not clear that awardee's proposal would result in lowest overall cost to government.

DECISION

Kaufman Lasman Associates Inc. protests the award of a contract to Larry Latham Auctioneers, Inc. under request for proposals (RFP) No. 26/101/2 issued by the Veterans Administration (VA) for auctioneering services in connection with sales of single family properties owned by VA. In response to the protest, VA decided to hold discussions and request best and final offers from all offerors in the competitive range, and, if appropriate, terminate Latham's contract. Latham then filed a protest challenging VA's decision to take corrective action. We dismiss both protests.

The RFP called for auctioneering services for calendar year 1988 in connection with sales of single family homes owned by VA. Offers were to be evaluated on the basis of 100 total points, divided among marketing approach (60 points), organizational capability (25 points) and price (15 points). Award was to be made to the offeror with the highest combined points. With regard to price, section B of the RFP required offerors to specify a percentage fee to be paid by the government based on three increments of property sales volume. The fee for the first increment would apply for all sales up to \$4,999,999; for the second increment, for all

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sales between \$5 million and \$14,999,999; and for the third increment, all sales over \$15 million. The three increments were each assigned 5 of the 15 total points assigned to price. The lowest priced offeror in each of the increments would receive five points. The next four lowest priced offerors in each increment would receive from one to four points respectively. Any offeror whose price was greater than the fifth lowest offeror's price would receive no points.

Thirteen offers were submitted. After an initial evaluation, VA established a competitive range of nine offerors. Latham received the highest technical score (76.25 of 80 points) and tied one other offeror in the competitive range for the highest number of points for price (10). Kaufman received the second highest overall score (73.66 technical points, 6 price points). With regard to the percentage fees, Latham proposed 2.99 percent for the first increment (sales up to \$5 million), 6.83 percent for the second increment (sales between \$5 million and \$15 million), and 1.99 percent for the third increment (sales over \$15 million). In comparison, Kaufman's proposed fees of 4.11 percent, 3.985 percent and 3.495 percent. Since Latham proposed the lowest fees for the first and third increments, it received five points for each; Latham received no points for the second increment since its fee was the highest proposed for that increment.

VA made award to Latham on the basis of initial proposals, and subsequently held a debriefing for Kaufman during which VA discussed how Kaufman could improve two areas in its technical proposal which VA had found to be inadequate. Kaufman then filed its protest with our Office, contending that the award to Latham was improper because Latham's proposal was materially unbalanced in view of the disparity among the percentage fees it offered for the three increments of sales volume. Kaufman also challenged VA's evaluation of its technical proposal.

In response to the protest, VA decided to hold discussions and request best and final offers from all offerors in the competitive range and, if appropriate, terminate the award to Latham. VA's decision was based on its conclusion that it could not properly make award under the RFP on the basis of initial proposals. We agree. As the parties recognize, due to the fee structure in the RFP, different offerors will be lower in price overall depending on the actual sales volume achieved. Since the RFP contained no estimates of sale volume, and the fees vary according to sales volume, it is not possible to determine which offeror is the lowest priced. Accordingly, as VA found, any award based on the

initial proposals would be improper under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(1)(B) (Supp. III 1985), which authorizes such awards only where it is clear that award will result in the lowest overall cost to the government.

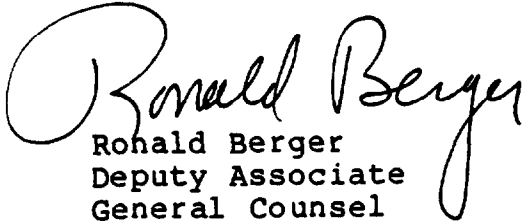
Both Kaufman and Latham object to VA's proposed action. Kaufman argues that Latham should be excluded from further participation in the competition because its proposal was "nonresponsive" due to the alleged material unbalancing of its prices. As Kaufman recognizes, the concept of responsiveness does not apply to negotiated procurements. Keyes Fibre Co., B-225509, Apr. 7, 1987, 87-1 CPD ¶ 383. In any event, to the extent Kaufman argues that VA was required to reject Latham's proposal as unacceptable due to the alleged unbalancing, Kaufman's argument is without merit since the unbalancing issue clearly is an appropriate matter to be raised during discussions. See Keystone Engineering Co., B-228026, Nov. 5, 1987, 87-2 CPD ¶ 449.

Latham argues that conducting discussions at this point would be improper in view of the postaward debriefing Kaufman received which, due to the nature and detail of VA's remarks, involved technical leveling and transfusion. Latham urges allowing its award to stand or canceling the RFP.

Despite the debriefing, we believe that opening negotiations is appropriate. While VA concedes that it discussed areas of potential improvement in Kaufman's proposal during the debriefing, there is no indication that the discussion concerned features unique to Latham's proposal. Thus, Latham's assertions regarding technical transfusion appear to be unfounded. Further, while agencies are charged with avoiding both technical leveling and technical transfusion during discussions, Federal Acquisition Regulation § 15.610(d), we have recognized that concerns about technical leveling and transfusion generally do not overcome the need in a given case to remedy a procurement that did not satisfy the statutory requirement for full and open competition. See Pan Am Support Services, Inc.--Request for Reconsideration, B-225964.2, May 14, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 512. Accordingly, we do not agree with Latham that its award should be allowed to stand. The award to Latham based on initial proposals was improper under CICA and must be remedied. We also fail to see how canceling the RFP would be beneficial since any advantage derived from the debriefing that Kaufman would enjoy in connection with reopening competition under the current RFP could also be utilized under a new RFP.

Latham also maintains that Kaufman should be excluded from further participation in the competition because of a "material misrepresentation" Kaufman allegedly made in connection with its protest. The alleged misrepresentation concerns a statement by Kaufman that a particular exhibit was attached to its proposal. We see no need to address Latham's argument in this regard since VA has confirmed Kaufman's statement that the exhibit was attached to its proposal.

The protests are dismissed.


Ronald Berger
Deputy Associate
General Counsel