



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Larry Latham Auctioneers, Inc.--Request for
Reconsideration
File: B-229917.3
Date: March 16, 1988

DIGEST

Request for reconsideration of decision upholding contracting agency's decision to set aside award improperly made on the basis of initial proposals and open negotiations with all offerors in the competitive range is denied where protester fails to show any error of law or fact in prior holding that the need to resolve the statutory violation involved in improper award on initial proposal basis outweighed concerns about technical leveling or transfusion due to opening negotiations.

DECISION

Larry Latham Auctioneers, Inc. requests reconsideration of our decision, Kaufman Lasman Associates Inc., et al., B-229917, et al., Feb. 26, 1988, 88-1 CPD ¶ _____, which in part dismissed Latham's protest challenging the decision by the Veterans Administration (VA) to hold discussions and request best and final offers (BAFOs) from all offerors in the competitive range and, if appropriate, terminate the contract awarded to Latham under request for proposals (RFP) No. 26/101/2 for auctioneering services in connection with sales of single family properties owned by VA. VA's decision to open negotiations was in response to an initial protest by Kaufman challenging the award to Latham based on initial proposals. We deny the request for reconsideration.

In our original decision we found that VA had properly concluded that award to Latham based on initial proposals was improper since under the fee structure in the RFP it was not possible to determine from initial proposals which offeror was the lowest priced. Accordingly, as VA found, any award based on initial proposals was improper under the Competition in Contracting Act of 1984, 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

041586/133310

lowest overall cost to the government. VA then decided to hold discussions and request BAFOs from all offerors in the competitive range, and, if appropriate, terminate the award to Latham.

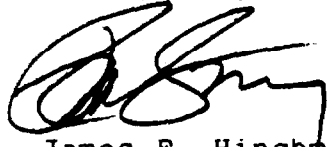
In its protest, Latham objected to VA's proposed action, arguing that opening negotiations would be improper because of the detailed postaward debriefing Kaufman received from VA which, in Latham's view, involved technical transfusion and leveling. We found that VA's decision to open negotiations was appropriate, noting that the record did not appear to support Latham's contention that technical transfusion had occurred and that, in any event, the need to remedy the statutory violation involved in allowing the award to Latham to stand outweighed any concerns about technical transfusion or leveling. See Pan Am Support Services, Inc.--Request for Reconsideration, B-225964.2, May 14, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 512. In addition, we noted that neither of the remedies Latham suggested--allowing the award to Latham to stand or canceling the RFP and resoliciting--was a viable alternative to opening negotiations.

In its reconsideration request, Latham does not address the central finding of our decision--that any award under the RFP based on initial proposals would be improper, and, as a result, the award to Latham could not be allowed to stand. Instead, Latham focuses on our discussion of its contention that VA had engaged in technical transfusion during Kaufman's debriefing. Latham argues that the record does not support our statement that the debriefing did not concern features unique to Latham's proposal. We disagree. The record shows that during the debriefing VA suggested areas of potential improvement in Kaufman's proposal. Even assuming, as Latham asserts, that its proposal included the specific features VA discussed with Kaufman, there is no indication that those features were unique to Latham's proposal.

The remaining contention raised in the reconsideration request concerns Latham's argument that Kaufman should be excluded from further participation in the competition because of a "material misrepresentation" Kaufman allegedly made in connection with its protest. Specifically, Latham challenged Kaufman's assertion that a document showing Kaufman's proposed budget had been submitted to VA together with its proposal. As we stated in our decision, VA ultimately confirmed that the document had been submitted with Kaufman's proposal; we see no need to independently verify VA's statement, as Latham suggests.

Latham also reiterates its argument that even if the budget document were submitted with the proposal, Kaufman made a material misrepresentation in connection with its discussion of the document in the protest which justifies excluding Kaufman from further participation in the procurement. In its comments on the reconsideration request, Kaufman disputes Latham's contention, arguing that its discussion of the contents of the budget document was accurate. In our view, the record appears to support Kaufman's position, not Latham's. In any event, Latham's contention that a material misrepresentation was made concerns Kaufman's characterization in its protest of what it had offered in its proposal. Unlike the cases cited by Latham, the alleged misrepresentation does not involve an offeror's statement to the contracting agency in the course of a procurement concerning the contents of its proposal, which favorably influences the agency's evaluation of the proposal. See Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53; SETAC, Inc., B-209485, July 25, 1983, 83-2 CPD ¶ 121. Nor did the alleged misrepresentation affect VA's decision to open negotiations, which was based on the impropriety of the award to Latham on the basis of initial proposals. Accordingly, even if Latham's contention that a misrepresentation was made were supported by the record, we would see no merit to Latham's argument that Kaufman should be excluded from further participation in the procurement on this basis.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel