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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hartridge Equipment Corporation--Request for Reconsideration

File: B-228303.2

Date: May 24, 1988

DIGEST

Contracting agency may not award a contract on the basis of initial proposals where the pattern of prices received reasonably indicate that the government could obtain significant savings by conducting discussions.

DECISION

The Department of the Army, Army Materiel Command, requests that we reconsider our decision in Hartridge Equipment Corp., B-228303, Jan. 15, 1988, 88-1 CPD ¶ 39. In that decision, we sustained the protest by Hartridge Equipment Corporation against the award of a contract to Nucleus Corporation under request for proposals (RFP) No. DAA09-87-R-0673, issued by the Army Armament, Munitions and Chemical Command, Rock Island, Illinois, for the acquisition of 30 Fuel Injection Test Stand (FITS) units.1/ Specifically, we sustained the protest because we found that the Army improperly awarded the contract on the basis of initial proposals where it appeared that acceptance of an initial proposal would not result in the lowest overall cost to the government. The Army now advances numerous reasons why our prior decision contains errors of law.

We affirm the decision.

The RFP was issued on April 22, 1987. The RFP allowed offerors to submit unit prices with or without first articl approval and cautioned offerors that offers without first article approval that did not contain the information required by Section L-6 (contract numbers and dates of identical or similar items furnished to the government) "may" not be considered for award. The RFP also incorporated by reference the Federal Acquisition Regulatic (FAR) § 52.215-16 (FAC 84-17) clause entitled "Contract

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1/ FITS is used to calibrate fuel pumps of diesel engines in motorized vehicles, such as tanks, halftracks and armore personnel carriers.

Award," which informed offerors of the possibility of awarding the contract on the basis of initial proposals without discussions.

The following three offers were received by the closing date of July 17, 1987:

Offeror	W/FA Unit Price	W/Out FA Unit Price
Nucleus Corp.	$ 60,800	$ 60,600
Hartridge	No bid	51,000
Bacharach, Inc.	81,532	78,969

Hartridge's total offer was $1,530,000. The Nucleus offer with first article was $1,824,000.

The agency's review of proposals showed that Nucleus had submitted the lowest conforming offer with first article approval and Hartridge had submitted the lowest conforming offer without first article approval. The Army decided not to waive the first article requirement; since Hartridge had only submitted an offer for providing the FITS without first article approval, the Army awarded a contract without discussions on September 11, 1987, to Nucleus, the lowest conforming offeror that proposed on a first article approval basis.

After notification, on September 16, 1987, of award to Nucleus at a unit price of $60,800 with first article approval (Hartridge had offered $51,000 per unit without first article), Hartridge alleged that it discovered that it had mistakenly inserted its unit price and total amount in a line item of the schedule designated as "Without First Article Approval." Instead, Hartridge stated that it intended to submit the offer on the line item of the schedule designated as "With First Article Approval." Hartridge contended that this mistake was obvious on the face of its proposal because Hartridge did not supply the information required by the RFP for an offeror to be eligible for waiver of first article approval. Hartridge also argued that the Army should have known from the procurement history of the item that the firm was not eligible for first article waiver. Consequently, Hartridge argued that because award without discussion was contemplated, in accordance with FAR § 15.607(c) (FAC 84-16) the contracting officer should have notified Hartridge of the mistake and allowed it an opportunity to verify whether or not it was offering on the basis of first article.

We sustained the protest because we found that discussions should have been held in this case.

We noted that under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1985), a contracting agency may make an award on the basis of initial proposals where the solicitation advises offerors of that possibility and the competition or prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government. Where, however, it appears that acceptance of an initial proposal will not result in the lowest overall cost to the government, the agency is not free to award on an initial proposal basis, but instead must conduct discussions in an attempt to obtain the lowest overall cost or to otherwise determine the proposal most advantageous to the government. See Training and Information Services, Inc., B-225418, Mar. 9, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 266.

In our decision, we found that it should have been evident to the Army that the initial proposal it accepted did not necessarily represent the lowest overall cost to the government. Hartridge's initial low conforming offeror of $51,000 without first article approval was $9,000 less than the next low offer on a with or without first article basis. Two other offerors submitted proposals on both a first article and waiver of first article basis, and those offers indicated that the maximum difference in the cost of the first article was approximately $2,500, substantially less than the difference between Hartridge's low offer and the awardee's offer. Furthermore, the solicitation permitted the contractor to furnish either a preproduction model or an initial production item for first article testing. In this regard, the Army acknowledged that Hartridge is a well-established manufacturer. Since Hartridge committed itself to a production run in its offer, and thus could be expected to be able to readily meet the first article requirement without any major additional effort, we stated that Hartridge's price was not likely to increase significantly with the addition of a first article unit. Under these circumstances, we did not believe the Army was in a position to conclude that acceptance of the initial Nucleus proposal would result in the lowest overall cost to the government. Rather, in light of the offers that it did receive and the prices associated with those offers, we stated that it was incumbent on the Army not to accept Nucleus' initial proposal, but rather to conduct discussions to determine if, as should have seemed likely, a less expensive acceptable

offer was available from Hartridge. We therefore concluded that the Army's failure to do so was inconsistent with the requirements of CICA, and we awarded protest and proposal preparation costs to Hartridge since no other corrective action was appropriate.

In its request for reconsideration, the Army advances a series of arguments in support of its position that the contracting officer acted properly in awarding the contract on the basis of initial proposals. The Army argues that Hartridge was reasonably considered as having submitted a "no bid" on the item with first article so that the firm was not eligible to be included in the competitive range once the government decided not to waive first article; that acceptance of Hartridge's offer would have been tantamount to accepting a late proposal since Hartridge may have intentionally refused to accept the risks of first article, including the risk of default for failure to pass the first article test; and that our decision constitutes "post-award speculation" in lieu of the documented pre-award discretionary judgment of the contracting officer concerning the maximum difference in costs of first article of the various offerors.

We think that our prior decision correctly stated a simple rule concerning the circumstances permitting an agency to award a contract on the basis of initial proposals. As stated above, CICA unequivocally requires that the agency not make award on the basis of initial proposals unless the competition or prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government. Stating this rule differently, we think that where the circumstances of the competition, including the pattern of prices obtained, reasonably place the contracting officer on notice that award on the basis of initial proposals may not result in the lowest overall cost to the government, the agency is not free to proceed to such an award. See Kinton, Inc., B-228260.2, Feb. 5, 1988, 67 Comp. Gen. ____, 88-1 CPD ¶ 112.

Here, the price obtained from an admittedly very experienced offeror, Hartridge, although without first article, was substantially below the price received from the second low offeror with first article included. Moreover, the prices received indicated that the cost of first article was in the $2,500 range, substantially less than the difference between Hartridge's offer and the second low offeror's price. We do not think that the contracting officer could reasonably ignore these price differences. We think the contracting officer could have reasonably viewed Hartridge's failure to submit a separate price for the item with first article

either as a mistake, as Hartridge contends, or as an erroneous, but honest, belief on the part of Hartridge that it was entitled to first article waiver. However, we do not think that Hartridge's proposal could be viewed as irrevocably refusing to offer a first article if such a requirement was a condition for award.

The solicitation permitted the contractor to furnish a preproduction model or an initial production item for first article, and therefore Hartridge could have been expected to readily meet the first article requirement without any major additional effort. The circumstances thus indicated the significant possibility that Hartridge, if given the opportunity, would amend its offer to include a preproduction or initial production item as a first article. We do not agree that acceptance of Hartridge's offer would be tantamount to accepting a late proposal. As stated above, Hartridge was committed to a full production run so that the designation of an initial production item as a first article was potentially of minor consequence. Stated differently, under the circumstances here we are not inclined to conclude that Hartridge's initial proposal could not be revised to include a price for performance that included first article. In this regard, an offeror's initial proposal need not price all items; rather, under appropriate circumstances, prices for other line items may be added in an offeror's best and final offer where the initial proposal is otherwise acceptable without contravention of the rule prohibiting acceptance of late proposals. See Control Data Corp. et al., B-196722, June 26, 1981, 81-1 CPD ¶ 531.

In short, our decision merely requires a contracting officer to be reasonably certain, after examining the prices received during the competition, that through negotiations the government could not obtain a better price from the offerors. Here, the contracting officer was or should have been on notice from the pattern of prices received that the government could potentially realize a significant cost savings by conducting discussions, and therefore it was incumbent on the Army not to accept the second low offeror's initial proposal, but rather to conduct discussions to determine whether a less expensive acceptable offer was available from Hartridge or the other firms.

Our prior decision is affirmed.

Milton J. Socolar

Acting Comptroller General
of the United States