Gary

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Industrial Lift Truck Company of New Jersey, Inc.; Doering Equipment, Inc.
File: B-230821; B-230821.2

Date: July 18, 1988

DIGEST

1. Where awardee's proposal is found, subsequent to award, to be materially defective, agency decision to rescind award made on basis of initial proposal and to hold discussions with all offerors in competitive range, including initial awardee, is proper.

2. Where awardee's proposal is found to be deficient after award, agency is not required to terminate and make award to higher-priced offeror without first allowing awardee to correct deficiencies through discussions.

3. Once agency has determined that initial proposal on which award was based is materially deficient, rescinding the award and initiating competitive range discussions, even though prices have been disclosed, is the appropriate remedy; the statutory requirements for competition take primacy over regulatory prohibitions of auction techniques.

DECISION

Industrial Lift Truck Company of New Jersey, Inc., and Doering Equipment, Inc., protest a decision of the Department of the Navy to rescind an award made to Doering under request for proposals (RFP) No. N00140-88-R-RF00, for the purchase or lease of telescoping aerial work platforms for the Philadelphia Naval Shipyard and, prior to making a new award, to conduct discussions with all offerors within the competitive range, including Industrial and Doering. Doering protests the rescission of its award, asserting that it should be reinstated as the awardee on the basis of its initial proposal, without opening discussions. Industrial, which filed a protest of the award to Doering prior to the rescission, agrees that rescission of the award is appropriate, but asserts that Industrial is the only responsive and responsible offeror and should receive the award on the basis of its own initial proposal, again, without holding discussions.

042755

We deny the protests.

The RFP solicited offers on two models of aerial lift platforms for use in the Philadelphia Naval Shipyard, and also required offerors to furnish technical manuals and operator safety manuals for the equipment, and included separate delivery schedules for the equipment and the two kinds of manuals. The RFP provided that award could be made on the basis of initial proposals, without discussions, and that award would be made to the responsible offeror whose offer conformed to the solicitation and was most advantageous to the government, cost or price and other factors considered. The RFP further stated that offers not proposing to meet the required delivery schedule would be rejected. Of the nine offers submitted, Doering's was the low, technically acceptable offer; the Navy thus made award to the firm.

Industrial Lift protested the award on the ground that, among other things, Doering's proposal was nonresponsive, and Doering was nonresponsible. In the course of preparing its response to Industrial's protest, the Navy discovered what it considered to be a material defect in Doering's proposal that, although not raised in Industrial's protest or noticed previously by the agency, led the Navy to conclude that award on the basis of Doering's initial proposal had been improper. Specifically, the agency determined that Doering's proposal took express exception to the required delivery schedule with respect to 400 operator safety manuals required by the RFP (200 for each model of platform). The solicitation specified delivery of the manuals 30 days after contract, and Doering proposed delivery 125 days after contract, when delivery of the platforms was required. Consequently, the Navy notified Doering that the previously overlooked discrepancy in the firm's proposed delivery schedule required rescission of the award, and that it would hold discussions with Doering and all other offerors in the competitive range prior to making a new award.

Doering's Protest

Doering protests the proposed action on the ground that, although its proposal did indicate that all deliverables, including the safety manuals, would be delivered at the time specified in the RFP for delivery of the platforms, namely, 125 days after contract, this was a minor oversight or mistake that should have been resolved through a simple request for clarification by the Navy. The firm states it was at all times ready, willing, and able to deliver the manuals within 30 days of contract award, as required by the RFP, and that if the Navy had sought clarification of the discrepancy Doering would have advised the agency that it

could meet the 30-day delivery schedule. In any case, Doering asserts that the discrepancy in question was immaterial. According to the firm, it did not affect the contract price, since the manuals were not separately priced and were a negligible fraction of the total cost of the contract; nor did it have an effect on the agency's actual requirements, since, according to Doering, the requirement in the RFP that manuals be delivered in 30 days apparently was not part of the Navy's real minimum needs. Doering concludes that the deficiency in its proposal provided no basis for rescission of the firm's award.

Delivery ordinarily is considered to be a material term of a solicitation, and award generally cannot be made on the basis of a proposal that takes exception to a required delivery schedule. See Environmental Tectonics Corp.--Reconsideration, B-225474.2, et al., Apr. 9, 1987, 87-1 CPD ¶ 391; Granger Assocs., B-222855, Aug. 11, 1986, 86-2 CPD ¶ 174. In the present case, the RFP unequivocally placed offerors on notice that proposals that failed to conform to the required delivery terms would be rejected, and the Navy explains that it needed prior delivery of the manuals to review their technical acceptability before arrival of the equipment. According to the agency, if it specified delivery of both at the same time, it could have faced the prospect of paying a substantial monthly rental for equipment that its operators could not use because they lacked suitable safety manuals. In our view, the Navy has established it had a legitimate need for early delivery of the manuals, and that the delivery requirement therefore was material.

The fact that Doering asserts that it would have made delivery within the required 30-day period if the Navy had asked is irrelevant. Even in negotiated procurements, an agency does not have discretion to disregard an offeror's failure to satisfy a material RFP requirement in its proposal. See System Development Corp. and Cray Research, Inc.--Reconsideration, B-208662.2, Apr. 2, 1984, 84-1 CPD ¶ 368. Rather, under these circumstances, since information solicited from Doering was essential to determine compliance of the firm's proposal with the material delivery requirements, Doering's proposal could not be corrected other than by conducting discussions. Discussions are to be distinguished from clarifications, which are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal. See Federal Acquisition Regulation (FAR) § 15.601 (FAC 84-28); see also Corporate America Research Assoc., Inc., B-228579, Feb. 17, 1988, 88-1 CPD ¶ 160. Moreover, discussions could not be held only with

Doering; it is fundamental that where discussions are held with one offeror, they must be held with all other offerors in the competitive range. See E.C. Campbell, Inc., B-222197, June 19, 1986, 86-1 CPD ¶ 565.

In our view, therefore, the Navy's proposal to hold discussions with Doering and others in the competitive range is an appropriate means of providing Doering an opportunity to modify its proposal to comply with the RFP's delivery requirements.

Doering cites Hollingsead International, B-227853, Oct. 19, 1987, 87-2 CPD ¶ 372, for the proposition that award may be made on the basis of an initial proposal whose delivery terms deviate from those specified in the RFP, but meet the agency's actual needs. Doering's reading of our decision is incorrect. In that case, the agency did not make award on the basis of the initial, nonconforming proposal, but rather, only after holding discussions with all offerors and requesting their revised proposals on the changed delivery terms. This is the proper course of action and is essentially what the Navy proposes to do here, after reviewing its needs and the terms of the solicitation.

Doering also challenges the propriety of opening discussions here on the ground that critical information about its approach to the solicitation has been disclosed, so that it would suffer competitive harm from discussions, and doing so would result in an improper auction. As we have made clear in similar situations, the importance of correcting an improper award through further negotiations overrides any possible competitive disadvantage. See Norden Systems, et al.--Reconsideration, B-227106.3, et al., Oct. 16, 1987, 87-2 CPD ¶ 367. In any event, the statutory requirements for competition take primacy over the regulatory prohibitions of auction techniques. See The Faxon Company, B-227835.3 et al., Nov. 2, 1987, 87-2 CPD ¶ 245. We note that the Navy has stated it will provide copies of each disclosed document to all offerors here in order to eliminate any possible advantage gained through disclosure of documents.

Industrial's Protest

Industrial protests that it should have received the award on the basis of its own initial proposal because it was the only one that was technically acceptable. Under the Competition in Contracting Act of 1984, however, an agency may

not make an award based on initial proposals, without discussions, that would not result in the lowest overall cost to the government. See Pride Computer Service, Inc., B-227805, Sept. 25, 1987, 87-2 CPD ¶ 302; see also, FAR § 15.610(a)(3). Here, since Doering was the low offeror, the Navy was required to determine whether Doering's low-priced proposal was reasonably susceptible of being made acceptable through discussions; it could not, as Industrial suggests, simply make award to another firm on the basis of its higher-priced initial proposal. Further, as for Industrials argument that Doering's proposal should be rejected as nonresponsive (i.e., technically unacceptable), it is fundamental that in a negotiated procurement, proposal deficiencies do not automatically warrant rejection; rather, the agency should employ discussions where, as here, the proposal is deemed susceptible to correction, to afford offerors an opportunity to make their proposals acceptable. See Hollingsead, B-227853, supra.

The protests are denied.

James F. Hinchman
General Counsel