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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Weeks Marine, Inc./Bean Dredging Corp., a Joint Venture

File: B-236345

Date: November 30, 1989

DIGEST

Determination of whether the reopening of negotiations based on a late proposal modification is in the government's best interest is within the contracting officer's discretion; decision to reopen where the late modification showed the availability of prices significantly lower than those received in best and final offers does not constitute an abuse of discretion.

DECISION

Weeks Marine, Inc./Bean Dredging Corp., a joint venture, protests the award of a contract to Great Lakes Dredge & Dock Co., under request for proposals No. N62472-87-R-0040, issued by the Naval Facilities Engineering Command, Northern Division, for phase 2 dredging at Naval Weapons Station Earle, in Colts Neck, New Jersey.

We deny the protest.

By the May 2, 1989, closing date, Weeks submitted an initial proposal at a price of $18,499,415, and Great Lakes submitted a proposal for $19,572,750. In late June, well after the RFP closing date, Great Lakes submitted an unsolicited proposal modification reducing its price to approximately $17,200.000. Subsequently, Weeks was informed that its proposal was within the competitive range, and that best and final offers (BAFOs) were due by June 30. Weeks states that the Navy did not advise Weeks that a late modification received from Great Lakes had influenced the Navy to seek BAFOs. Weeks asserts that no technical discussions were held, and the Navy did not notify Weeks that its proposal was deficient in any regard.

Weeks contends that because only Great Lakes knew that its late modification had precipitated another round of BAFO's,

Great Lakes was at a competitive advantage and, as a result, submitted a BAFO of $16,390,500, approximately $3 million lower than its initial offer. Weeks states that it did not reduce its BAFO price because it had submitted its most favorable price in its initial offer, and because it did not know of Great Lakes' late modification. Weeks contends that the Navy improperly considered Great Lakes' modification to its proposal in violation of Federal Acquisition Regulation (FAR) §§ 15.412(c) and (d), because the late modification did not satisfy the conditions under which late modifications or proposals may be accepted. Weeks also contends that Great Lakes had become aware that Weeks had submitted a proposal as the result of a conversation between Great Lakes' subcontractor and Weeks' joint venture partner. Finally, Weeks protests the Navy's use of negotiated procurement procedures.

The Navy maintains it did nothing improper here. It explains that since both initial proposals exceeded the original government estimate of $16,845,00, and because the two proposals were significantly disparate on an item by item basis, it contacted the two offerors to allow them to explain the basis for some of the unit costs and how they intended to perform the work. As a result of these discussions, the government estimate was increased to $19,488,282. Then, roughly 6 weeks after receipt of initial proposals, Great Lakes submitted an unsolicited late modification to the Navy, which the Navy did not open. Great Lakes then telecopied an unsolicited late modification to its proposal in which Great Lakes lowered its price to $17,171,250, which was $1,326,165 lower than Weeks' offer and almost $2-1/2 million lower than its own initial proposal.

The Navy states that, since Great Lakes' telecopied modification indicated the potential for significant cost savings, the contracting officer determined that holding discussions and requesting BAFOs would be in the government's best interest. The Navy contends that since both offerors were afforded the opportunity to revise their proposals, neither offeror received a competitive advantage over the other.

In its comments on the Navy's report Weeks points out that a business clearance memorandum had recommended award to Weeks; before this recommendation was acted on, Great Lakes submitted its late modification. Weeks asserts that Great Lakes' late modification was prompted by its concern over competition from Weeks. Weeks also asserts that once the Navy realized that the government could achieve substantial price savings by conducting another round of discussions, it

was incumbent on the Navy to advise Weeks that its price proposal substantially exceeded the Navy's reasonable expectations.

We have held that an agency may, but is not automatically required to, reopen negotiations where one offeror submits a late modification that reduces its price. Rexroth Corp., B-220015, Nov. 1, 1985, 85-2 CPD ¶ 505. The decision whether to reopen negotiations is within the contracting officer's discretion and essentially should be based on whether the late modification fairly indicates that negotiations would be highly advantageous to the government. Nelson Elec., Marine Div., B-227906, Sept. 21, 1987, 87-2 CPD ¶ 286. Thus, although Great Lakes had no legal right to a reopening of discussions, the contracting officer was not precluded from reopening based on the firm's late modification. Id. In view of the significant ($1,326,165) savings Great Lakes' modification showed could be obtained, we find that the contracting officer's decision to reopen negotiations and request BAFOs was reasonable.

Weeks' argument that the FAR precluded the Navy's action here is without merit. The cited provisions relate only to the acceptance of late proposals or modifications. The Navy did not accept Great Lakes' late modification; rather, it reopened negotiations with both offerors and gave both an opportunity to submit BAFOs. We have specifically rejected the argument that these FAR provisions preclude a contracting officer from reopening negotiations after the receipt of a late modification. Nelson Elec., Marine Div., B-227906, supra. Further, there was no duty on the part of the contracting officer to tell Weeks of the late modification, and the fact that Great Lakes apparently learned from Weeks' partner that Weeks may have submitted a proposal on this RFP has no bearing on whether or not the contracting officer could exercise his discretion to reopen negotiations, since there is no evidence that this information was provided by government officials.

With respect to the extent of discussions conducted, we have held that a request for BAFOs, in itself, constitutes meaningful discussions where, as here, a proposal contains no technical uncertainties. Industrial Airsystems, Inc.--Reconsideration, B-231479.2, Sept. 22, 1988, 88-2 CPD ¶ 276. Further, the government has no responsibility to tell an offeror that its price is too high unless the government has reason to think the price is unreasonable. Id; see Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54. Since Week's initial price was substantially lower than Great Lakes' initial price, and in view of the revised government cost estimate and the Navy's view that the

dredging industry was undergoing a volatile market, there was no basis for the Navy to advise Weeks that its initial price was unreasonable.

Finally, Weeks did not respond to the Navy's rebuttal of Weeks' allegation that negotiated procurement procedures should not have been used so we consider this issue abandoned. In any event, this protest ground concerns an alleged apparent solicitation impropriety which is untimely since it was not filed until after the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1989).

Weeks claims entitlement to recovery of the costs of preparing its proposal and pursuing its protest; this claim is denied in view of our resolution of the protest. Encon Management Inc., B-234679, June 23, 1989, 89-1 CPD ¶ 595.

The protest is denied.

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