



Comptroller General  
of the United States

Washington, D.C. 20548

140172

## Decision

**Matter of:** Thermal Reduction Company

**File:** B-236724

**Date:** December 7, 1989

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### DIGEST

1. An award based on initial proposals, without holding discussions, is proper where the solicitation advises offerors of that possibility, no discussions are held, and the competition demonstrates that the acceptance of initial proposals will result in lowest overall cost to the government.
2. Protest that agency held discussions with the awardee but improperly failed to do so with the protester is denied where the agency's communication with the awardee did not give the firm the opportunity to revise its proposal or to furnish information necessary to evaluate the proposal.
3. Where award is to be made on an initial proposal basis, agency acted reasonably in deciding not to open discussions after highest offeror submitted a late price reduction since price reduction did not change the relative standing of the offerors, and was submitted 2 months after the initial closing date and pre-award survey had begun.
4. Protester, third low offeror, is not an interested party to challenge award of a contract to the lowest acceptable offeror where it has not challenged award to the second lowest offeror.

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### DECISION

Thermal Reduction Company protests the award of a contract to Zinco Products, Inc., through the Canadian Commercial Corporation (CCC), under request for proposals (RFP) No. DLA500-89-R-0385, issued by the Defense Logistics Agency (DLA) for corrosion preventive anodes.

We deny the protest in part and dismiss it in part.

The solicitation did not require the submission of technical proposals, and no evaluation factors other than price were stated. The RFP incorporated by reference the Defense Industrial Supply Center (DISC) Master Solicitation, which in turn incorporates Federal Acquisition Regulation (FAR) § 52.215-16, which advises offerors that award may be made on the basis of initial offers without discussions. Of the three technically acceptable offers received, CCC/Zincast submitted the lowest price; Thermal Reduction's price was the highest. DLA reports that even though Thermal Reduction submitted a revised proposal reducing its price 2 months after the deadline for receipt of proposals, this late modification was not considered and, in fact, did not change the offerors' relative standing.

DLA states that the contracting officer determined, without holding discussions, that CCC/Zincast had submitted the proposal most favorable to the government, and, based on CCC's endorsement of Zincast's proposal and no unfavorable information about Zincast which conflicted with CCC's determination that Zincast was a responsible contractor, that Zincast was responsible. According to DLA, after requesting information from Zincast to insure that the firm understood the solicitation requirements and to verify its price, the agency awarded the contract to CCC/Zincast.

Thermal Reduction contends that DLA's award of the contract without discussions with Thermal Reduction was improper. To support this assertion, the protester claims that DLA conducted discussions with Zincast, and thus was required to conduct discussions with Thermal Reduction also. DLA disagrees, arguing that to the extent it contacted Zincast prior to award, these communications--which were oral requests for verification of Zincast's price and regarding whether the firm would conform with the contract specifications--were not "discussions" as that term is used in negotiated procurements. We agree with DLA.

An agency may award a contract on the basis of initial proposals without holding discussions if the solicitation advises offerors of that possibility, no discussions in fact are held, and the competition demonstrates that the acceptance of initial proposals will result in the lowest overall cost to the government. FAR § 15.610(a)(3).

We have consistently held that discussions have taken place if an offeror is given the opportunity to revise its initial proposal. Advance Gear & Mach. Corp., B-228002, Nov. 25, 1987, 87-2 CPD ¶ 519. On the other hand, requesting information that relates to responsibility does not

constitute improper discussions or require that revised proposals be solicited from all offerors. A.B. Dick Co., B-233142, Jan. 31, 1989, 89-1 CPD ¶ 106. In this regard, questions pertaining to an offeror's capacity and capability involve issues of responsibility, that is, the offeror's ability to perform the contract, as opposed to the acceptability of its proposal, and therefore may be requested or provided without resulting in the conduct of discussions. Advance Gear & Mach. Corp., B-228002, supra. Moreover, discussions are distinguishable from requests for verification, which involve advising an offeror of a suspected mistake and requesting that the offeror affirm the accuracy of its proposed prices. Greenleaf Distribution Servs., Inc., B-221335, Apr. 30, 1986, 86-1 CPD ¶ 422.

We see no basis to object to the agency's communications with the awardee or, for that matter, to conclude that the agency engaged in discussions with the awardee. There were three offerors; CCC/Zincast's offer was the lowest received. Because it was so low in comparison to the other offers the contracting officer reasonably decided to request that Zincast verify its price. DLA later contacted Zincast and CCC (via a three-way conference call) for assurance that both Zincast and CCC fully understood all the terms and conditions of the solicitation. Contrary to the protester's assertion, these questions simply centered on Zincast's responsibility; there is no evidence in the record indicating otherwise. Since we find that no discussions were in fact held and the solicitation properly advised offerors that the agency may award the contract on the basis of initial proposals without discussions, DLA was not required to conduct discussions with Thermal Reduction. See FAR § 15.610(a)(3).

Thermal Reduction also argues that DLA was required to conduct discussions with all the offerors, based on its claim that DLA evaluated Thermal Reduction's late price reduction. Contrary to the protester's assertions, DLA contends that it did not evaluate Thermal Reduction's late price modification; rather, it merely noted the price on the price negotiation memorandum as a justification for refraining from opening discussions.

We have held that an agency may, but is not automatically required to, conduct discussions with all offerors where one offeror submits a late proposal that reduces its price. Rexroth Corp., B-220015, Nov. 1, 1985, 85-2 CPD ¶ 505. The decision to open discussions in these circumstances is discretionary with the contracting agency. Id. Discussions need not be opened unless a potentially significant modification fairly indicates that negotiations would prove

to be highly advantageous to the government. Timex Corp., B-197835, Oct. 10, 1980, 80-2 CPD ¶ 266.

We find DLA's determination not to conduct discussions was reasonable. Thermal Reduction's price reduction was not offered until almost 2 months after the initial closing date and after DLA had requested a pre-award survey on Zincastr; most importantly, Thermal Reduction was still the highest offeror even after its price reduction. We see nothing objectionable in the agency's judgment that it was not in the government's interest to incur the additional time and expense involved in opening negotiations under these circumstances.

Finally, Thermal Reduction challenges DLA's determination that the awardee is a responsible contractor. We dismiss this ground of Thermal Reduction's protest on the basis that Thermal Reduction is not an interested party as required under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(a) (Supp. IV 1986), and our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1989).

An interested party is defined as an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. CICA, 31 U.S.C. § 3551(2); 4 C.F.R. § 21.0(a). Generally, a party will not be deemed to have the necessary economic interest where there are other intervening offerors that would be in line for award if the awardee were eliminated from the competition. See Bulloch Int'l, Inc., B-236370, Sept. 18, 1989, 89-2 CPD ¶ \_\_\_\_.

Here, DLA reports that all three proposals received were technically acceptable. Of the three, Thermal Reduction's price was the highest; the second lowest offer was submitted by Seashield Marine Products. In this regard, DLA states that even if Thermal Reduction's protest against award to CCC/Zincastr were sustained, the contract would be awarded to Seashield because it submitted the second low, technically acceptable offer. Thermal Reduction has not alleged that Seashield is ineligible for award. Accordingly, since Thermal Reduction would not be in line for award even if this basis of its protest were sustained and because Thermal Reduction has not challenged the acceptability of the second lowest acceptable offer, we conclude that Thermal Reduction is not an interested party. Esilux Corp., B-234689, June 1, 1989, 89-1 CPD ¶ 538.

In any event, to the extent that Thermal Reduction alleges bad faith on the part of the procurement officials in finding Zincastr responsible, it has failed to provide any

persuasive evidence to support its contention. Procurement officials are presumed to act in good faith, and in order to show otherwise, a protester must submit virtually irrefutable proof that the agency had a specific and malicious intent to harm the protester. GPD Entrs., Inc., B-234193, Feb. 21, 1989, 89-1 CPD ¶ 182. Thermal Reduction has made no such showing here.

The protest is denied in part and dismissed in part.

*for Seymour E. Hinchman*  
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General Counsel