



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Dresser-Rand Company

**File:** B-237342

**Date:** February 12, 1990

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Patrick J. Martell, Esq., Pettit & Martin, for the interested party.  
Elizabeth A. McIntyre, Esq., and Douglas P. Larsen, Jr., Esq., Office of the General Counsel, Department of the Navy, for the agency.  
M. Penny Ahearn, Esq., and John M. Melody, Esq., GAO, participated in the preparation of the decision.

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### DIGEST

Protest is sustained where agency discovered after award that awardee's item was noncompliant with solicitation requirements, and proposes to modify contract by giving awardee opportunity to make its proposal acceptable; since agency's intended action would constitute reopening of discussions with awardee, agency is obligated to conduct discussions with all offerors in the competitive range.

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### DECISION

Dresser-Rand Company protests the award of a contract to Rix Industries under request for proposals (RFP) No. N00228-89-R-2223, issued by the Navy for compressor units for use in a ship alteration. The protester complains that award was made on a basis at variance with the solicitation requirements.

We sustain the protest.

The agency initially synopsisized the requirement in the Commerce Business Daily as an intended sole-source award to Rix. After Dresser-Rand and another company responded to the synopsis and requested copies of the solicitation, the agency converted the procurement to a competitive one. Subsequently, the requiring activity notified the agency

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that there was an urgent need for the compressors, as well as a need for an increased quantity. Consequently, the agency made a written determination to negotiate without providing for full and open competition due to unusual and compelling circumstances. See 10 U.S.C. § 2704(c)(2) (1988). The agency thereafter telephonically (apparently, because of the urgent time frame, an RFP was not sent to offerors) requested offers from only Rix, Dresser-Rand, and the other company that had responded to the synopsis. It requested offers on a firm fixed-price basis for compressors meeting the various requirements, including a referenced military specification and a 10 horsepower (HP) motor requirement. Two offerors, Rix and Dresser-Rand, responded by the September 1, 1989, closing date. Award was to be made to the low, technically acceptable offeror.

Rix offered a compressor with a 15 HP motor, which the firm claimed could operate at 15 HP or could be slowed down to 10 HP at no additional cost; the Navy determined that this item was acceptable. The protester offered a 7.5 HP motor, but the agency determined this item to be unacceptable due to noncompliance with the 10 HP motor requirement; it so informed the protester during discussions. After the agency's oral request for best and final offers (BAFOs), confirmed by telefaxed letters, the protester submitted a written revised BAFO to include a 10 HP motor at a unit price of \$59,983, for a total of \$719,796 for 12 units. The awardee submitted no written BAFO, but orally reiterated its original offer at a unit price of \$59,699, for a total of \$716,388. Both offerors' BAFOs were determined technically acceptable and award was made to Rix as the lowest-priced, technically acceptable, responsible offeror.

Subsequent to award, the contracting office learned from the requiring activity that only a 10 HP motor was acceptable in order to meet the government's minimum needs; that is, the 10 HP requirement was an absolute and mandatory requirement, rather than a minimum requirement that could be met by a higher HP motor as understood by the contracting office. In order to obtain equipment that will satisfy the government's minimum needs, the agency reports it now intends to modify Rix's contract by accepting what the agency characterizes as an alternate 10 HP motor as provided for in the awardee's original offer. Dresser-Rand takes issue with this action, arguing that the agency instead should award the contract to it as the only offeror in compliance with all of the solicitation requirements.

We agree with Dresser-Rand that the agency's intended action would be improper. Although the record shows that the Navy made the initial award in good faith, believing Rix's 15 HP

compressor exceeded the minimum solicitation requirement for a 10 HP motor at no additional charge, the record also establishes that the Navy's good faith belief was incorrect; Rix's 15 HP motor in fact did not meet the RFP requirements. We would agree with the Navy that substituting an alternate 10 HP motor, if originally offered by Rix at the same price, would be a permissible means of now satisfying the requirement. However, we find nothing in the record evidencing such an alternate offer by Rix. While the agency now refers to the awardee's BAFO offer as an oral reiteration of the firm's initial offer of either a 10 or 15 HP motor, the awardee's written initial offer gives no indication of an offer of other than a 15 HP motor, and there is no evidence that Rix's oral BAFO provided for such an alternate. The contract includes no such terms. Indeed, when the agency sent Rix the contract to be executed, it specified 10 HP and the protester signed and returned it on the basis of a change to 15 HP.

Given these circumstances, the Navy's proposed action essentially would give the awardee the opportunity to make its proposal acceptable after award and would constitute reopening of discussions with the firm. See International Filter Mfg. Corp., B-235049, June 21, 1989, 89-1 CPD ¶ 586. Conducting discussions with one offeror, however, necessitates holding discussions with all offerors in the competitive range, and providing all offerors an opportunity to submit revised proposals. 10 U.S.C. § 2305(b)(4) (1988); Motorola, Inc., B-225822, June 17, 1987, 87-1 CPD ¶ 604. Thus, the appropriate action here is to reopen the competition to give Dresser-Rand the same opportunity to revise its proposal that the Navy plans to give Rix. Award to the protester at this juncture would not be proper, since pre-BAFO discussions with Rix were not meaningful, i.e., Rix was not told that its offer was unacceptable. See Presentations South, Inc., B-229842, Apr. 18, 1988, 88-1 CPD ¶ 374.

The protester contends that, since prices have been disclosed, reopening discussions with all offerors would constitute an improper auction and would cause competitive harm to it. We repeatedly have held, however, that the importance of correcting an improper award through further negotiations overrides any possible competitive disadvantage to certain offerors. See Industrial Lift Truck Co. of N.J., Inc., et al., 67 Comp. Gen. 525 (1988), 88-2 CPD ¶ 61. In any event, the statutory requirements for competition take primacy over the regulatory prohibitions of auction techniques. See The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425.

By letter of today to the Secretary, we are recommending that the Navy reopen discussions with both Rix and Dresser-Rand, and give both an opportunity to submit new BAFOs. We also find that Dresser-Rand is entitled to reimbursement of its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.



for  
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