



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: AMP, Inc.

File: B-239287

Date: August 16, 1990

Thomas F. Martino for the protester.
Michael E. Wyant, Federal Prison Industries, Inc., U.S.
Department of Justice, for the agency.
Scott H. Riback, Esq., Andrew T. Pogany, Esq., and
Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

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

DECISION

AMP, Inc. protests the rejection of an offer for contract line item (CLIN) No. 0001 submitted by its wholly owned subsidiary, Matrix Science Corporation, under request for proposals (RFP) No. IND-187PH-0026-95 issued by Federal Prison Industries, Inc. (FPI). The agency made award on the basis of initial proposals after rejecting AMP's proposal because it allegedly did not contain complete pricing.

We sustain the protest.

The RFP, as amended, called for the submission of firm, fixed unit prices for numerous components used in the fabrication of connectors and wire termination devices. Each CLIN specified an estimated annual quantity for each of three military specifications (MILSPECs) for connectors and devices with which the various component parts had to comply. The RFP did not define the term component parts. The RFP also advised offerors that the government might award the contract on the basis of initial proposals. Overall, the RFP contemplated the award of a contract for a base period and five 1-year option periods. In addition, amendment No. 0001 to the RFP deleted language contained in the initial solicitation which had required FPI to make an "all or none" award of all CLINs. Finally, offerors were

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instructed to furnish price lists for "all items" covered under the referenced MILSPECS.

In response to the solicitation, FPI received two offers. After evaluation of the offers, FPI decided to award the entire requirement to Deutsch Engineered Connecting Devices without first holding discussions. By letter dated December 29, 1989, FPI informed the protester that its offer had been rejected as "nonresponsive" for failing to "[meet] all necessary items covered under the referenced MILSPECS." AMP, by letter dated January 12, 1990, submitted a Freedom of Information Act (FOIA) request to FPI asking for a specific statement regarding the agency's reasons for rejection of the firm's offer. The agency's response came in an undated letter which the record shows was received by the protester on April 4. AMP filed its protest in our Office on April 12, within 10 working days of its receipt of the agency's response to its FOIA request.

As an initial matter, the agency argues that AMP's protest is untimely. In particular, FPI argues that the protester had sufficient information to file its protest when it received the agency's letter of December 29 informing it that its offer had been rejected as "nonresponsive." We disagree.

The agency's December 29 letter, in our view, did not adequately apprise AMP of the specific basis for the rejection of the firm's offer and, therefore, did not provide it with the particular information which it needed to formulate its protest. FPI's December 29 letter merely stated, as quoted above, that the firm's offer was rejected as nonresponsive for failing to "[meet] all necessary items covered under the requested MILSPEC specifications." In contrast, the agency's response to AMP's FOIA request as it pertains to CLIN No. 0001 of the RFP^{1/} provided that the firm's offer was rejected for failing to provide "[c]omplete pricing of all component parts, i.e., panel nuts or O-Rings, required to build, requested items were not submitted." Since AMP's protest, filed within 10 days of its receipt of the agency's response to its FOIA request, is premised upon the notion that the agency should have sought this specific pricing information through a clarification request and since AMP diligently pursued the information relating to the agency's basis for rejection of its offer, we conclude that the protest is timely. See Carrier Corp., B-214331, Aug. 20, 1984, 84-2 CPD ¶ 197.

^{1/} AMP's protest relates only to the agency's rejection of its offer under CLIN No. 0001.

AMP argues that the agency erred in rejecting its offer for CLIN No. 0001 without seeking clarification of the firm's offer. In particular, AMP argues that its offer contained pricing for all components (e.g., tools, sealing plugs, socket units) but that some of these components were priced together in "shell kits" which included the individual components for which the agency states it needed a pricing breakdown. Consequently, AMP argues that its offer complied with the requirements of the RFP and that there was a simple misunderstanding as to what exactly constitutes individual component parts requiring separate pricing.

The agency responds that the RFP, when read as a whole, required firms to submit pricing on a component part basis. Specifically, FPI directs our attention to solicitation provisions which require vendors to supply price lists for "all items covered under the MILSPECS referenced" in the pricing schedule. The agency states that it required this information so that the information could be placed in FPI's inventory system for the purpose of price quoting to customers, inventory management and material requirements handling. Additionally, FPI argues that the protester was on notice that award could be made on the basis of initial offers and, consequently, it was not required to engage in discussions with the protester.

We think the agency improperly rejected AMP's low offer and improperly made award on the basis of initial proposals.^{2/} First, we point out that the agency's characterization of AMP's offer as "nonresponsive" is improper since the concept of responsiveness is inapplicable to negotiated procurements. Sierra Eng'g, B-237820, Jan. 16, 1990, 90-1 CPD ¶ 58. Moreover, the agency does not argue and the record does not support a finding that AMP's offer was technically unacceptable--the only concern that the agency had with AMP's offer for CLIN No. 0001 involved the pricing structure, and that matter clearly was easily resolvable through discussions.

Under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(1)(B) (1988), a contracting agency may make an award on the basis of initial proposals where the competition or prior cost experience demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government. Where, however, it appears

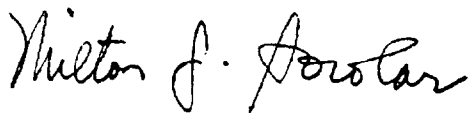
^{2/} We assume for purposes of this decision that AMP was the low offeror for CLIN No. 0001. The agency does not argue otherwise.

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. Hartridge Equip. Corp.-- Recon., B-228303.2, May 24, 1988, 88-1 CPD ¶ 491. Stating this rule differently, 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. Id.

Here, the contracting officer knew or should have known that AMP offered the low price for CLIN No. 0001 and that discussions with AMP to obtain more detailed component pricing could have resulted in a cost savings to the government since the pricing deficiencies were easily correctable through discussions. The agency does not argue otherwise. We therefore, conclude that the agency made award on the basis of initial offers where the competition did not demonstrate that such an award would result in the lowest overall cost to the government.

We are, by separate letter of today, recommending to the Director of the Federal Prison Industries that the pricing deficiencies found in AMP's offer under CLIN No. 0001 of the RFP be brought to the attention of the offeror and resolved and that the agency make award to the appropriate firm, after discussions and best and final offers. Should FPI then determine that AMP is properly in line for award under CLIN No. 0001, we further recommend that the contract awarded to Deutsch for this portion of the requirement be terminated for the convenience of the government and award be made to AMP. Finally, we find AMP to be entitled to the costs of filing and pursuing its bid protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990).

The protest is sustained.

for 
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