

Benejam



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Merrick Engineering, Inc.--Reconsideration
File: B-238706.4
Date: December 3, 1990

Charles E. Raley, Esq., Israel and Raley, for the protester. Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's mere assertion in request for reconsideration that because it is the exclusive authorized dealer of the required item in the United States, it would have been able to lower its price if it were given an opportunity to delete certain nonconforming terms from a standard form submitted with its offer, is not sufficient to establish that protester was competitively prejudiced by the award to the low offeror, especially where the protester's proposed price was approximately 43 percent higher than awardee's price for the same item and protester did not argue in initial protest that it could have lowered its price.

DECISION

Merrick Engineering, Inc. requests reconsideration of our decision in Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130, in which we denied Merrick's protest of the award of a contract to Hobart Brothers Company/Advanced Welding, Inc. (Hobart), under request for proposals (RFP) No. 110605, issued by Battelle Memorial Institute for an automatic plasma arc welding system. Battelle, a government prime contractor, manages, operates, and maintains by and for the Department of Energy the agency's Pacific Northwest Laboratories at Richland, Washington. In its protest, Merrick alleged that the contract award to Hobart was improper because the awardee submitted a proposal that took exception to certain material terms of the RFP. We denied the protest because we found that even if some technical deficiency in the award process occurred, Merrick was not competitively prejudiced by the deficiency.

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We deny the request for reconsideration.

The RFP was issued on January 12, 1990, requesting proposals for the plasma arc welding system on a brand name or equal basis, specifically for the "Merrick Engineering, Inc., Plasmafix 50E or equal." Award was to be made on the basis of the most advantageous proposal, price and other factors considered. Battelle received three proposals for the brand-name product by the January 26 proposal due date. Merrick's price (\$18,590) was substantially higher than Hobart's price (\$13,029). After an affirmative determination of Hobart's responsibility, Battelle orally awarded the contract to Hobart on February 16, followed by written confirmation on February 20.

The RFP incorporated Battelle's "Fixed Price General Provisions form A-287 (R1)," a document containing pertinent Federal Acquisition Regulation (FAR) clauses, and terms and conditions applicable to the procurement. Along with its proposal, Hobart submitted the signed RFP cover sheet which contained the required delivery date, a description of the welding system offered, and Hobart's total price. Instead of submitting Battelle's form A-287, however, Hobart substituted its own "Standard Terms and Conditions of Sale" (T&C) form containing terms different from those in form A-287. Regarding delivery, for example, Hobart's T&C stated that "shipment and delivery dates are quoted in good faith and are approximate," and its proposal indicated that shipment would occur within "approximately 8-10 weeks."

In its protest Merrick challenged the award to Hobart, maintaining that Battelle should have rejected Hobart's proposal because Hobart's proposal took exception to material terms of the RFP with respect to time of delivery, design, payment, warranty, termination, resolution of disputes, and passage of title.

Although both Merrick and Hobart offered the Plasmafix 50E welding system required by the RFP, Merrick's price was significantly higher than Hobart's. In addition, neither Merrick nor Hobart submitted form A-287 with its proposal, both offerors instead substituting their own standard forms with terms and conditions that differed from material terms of the RFP. Specifically, Merrick's standard form contained different terms from those in Battelle's form A-287 with respect to delivery, price, payment, warranties, and choice of law.

Under these circumstances, we concluded that Merrick could not reasonably argue that it would have received award had Battelle not improperly allowed Hobart to revise its initial

proposal, since Merrick's own offer took exception to various material provisions of the RFP. We also found that since Merrick's price was approximately 43 percent higher than Hobart's price for the same item, and since there was no indication that Merrick would have lowered its price enough to displace Hobart as the lowest priced offeror had it been given an opportunity to delete the nonconforming terms from the standard form submitted with its offer, Merrick had failed to show that it was competitively prejudiced by the award to Hobart. American Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65 (prejudice is an essential element of a viable protest, and where no prejudice is shown, or is otherwise evident, our Office will not disturb an award, even if some technical deficiency in the award process arguably may have occurred).

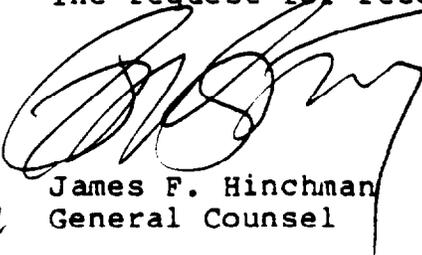
In its request for reconsideration, Merrick challenges our conclusion that it was not prejudiced by the award to Hobart. Merrick now argues that as the exclusive authorized dealer of Plasmafix systems in the United States, it has substantial discretion in pricing its systems and therefore can offer lower prices for maintenance, repair and services based on its continued relationship with the manufacturer. Citing SWD Assocs., B-226956.2, Sept. 16, 1987, 87-2 CPD ¶ 256, Merrick argues that it should now be permitted to delete the nonconforming terms from the standard form included with its proposal, and allowed to submit a revised offer.

In SWD Assocs., we sustained SWD's protest against the award of a lease for office space because the agency improperly held post-best and final offer (BAFO) discussions with the low offeror to remove exceptions taken in its BAFO. SWD specifically argued in its protest that its proposed price could have been lowered significantly had it been allowed the same opportunity as the awardee to participate in further discussions. We therefore concluded that since the awardee was provided the opportunity to remove a provision from its offer that took exception to a material term of the RFP, without providing the protester the same opportunity, the agency should have permitted SWD the opportunity to submit a more competitive price.

Unlike the protester in SWD Assocs., Merrick did not argue or present any evidence in its protest indicating that its substantially higher price would have changed had Merrick been given an opportunity to delete the nonconforming terms from the form it submitted with its proposal. Merrick's bare assertion now that it is the exclusive authorized dealer of Plasmafix systems in the United States, and that as such it could have lowered its price if it were given an

opportunity to delete the nonconforming terms from its offer, is not sufficient to show that Merrick was competitively prejudiced by the award to Hobart. See Alascom, Inc.--Recon., B-227074.2 et al., Sept. 16, 1987, 87-2 CPD ¶ 257. In our view, the 43 percent price differential between Merrick's and Hobart's price is a significant difference, and we have no reason to assume that Merrick could have or would have lowered its price enough to displace Hobart as the lowest priced offeror had it been given the opportunity to delete the nonconforming terms from its proposal. Consequently, we have no basis to conclude that Merrick was competitively prejudiced by the award to Hobart.

The request for reconsideration is denied.



for
James F. Hinchman
General Counsel