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

Decision

Matter of: Information Ventures, Inc.

File: B-241441.4; B-241441.6

Date: December 27, 1991

Robert G. Fryling, Esq., Saul, Ewing, Remick & Saul, for the protester.
Curtis Wilburn, Jr., Department of Agriculture, for the agency.
Stephen Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Termination of protester's contract and cancellation of solicitation was proper where, due to agency's inadvertent disclosure of low offeror's price prior to submission of best and final offers, agency reasonably determined that the procurement had been conducted in a manner prejudicial to the integrity of the competitive procurement system.

DECISION

Information Ventures, Inc. (IVI) protests the termination of its contract by the United States Department of Agriculture (USDA) and the decision by that agency to recompete the requirement. The contract, No. 53-3K06-1-20, was awarded to IVI under request for proposals (RFP) No. 45-3K06-90, to provide document indexing for the National Agricultural Library (NAL). IVI asserts that the termination was improper, and that the agency should either reinstate the contract or award a new contract to IVI on the basis of an earlier proposal.

We deny the protests in part and dismiss them in part.

The solicitation was issued in August 1990 as a total small business set-aside; it provided for award of a firm, fixed-price contract for the concept indexing of journal articles for NAL's AGRICOLA database. As amended, the solicitation provided that award would be made to the offeror whose proposal was most advantageous to the government, price and other factors considered. The evaluation would be based on technical factors worth a maximum of 700 points, and price, worth a maximum of 300 points. The solicitation also provided that, although technical factors were of paramount

importance, price would become increasingly important as proposals were more nearly equal technically.

Four firms submitted proposals and were determined to be in the competitive range; all were invited to participate in discussions with the agency. On February 6-7, 1991, USDA held discussions with Locus Systems, Inc. (LSI) and IVI; their best and final offers (BAFO), submitted later the same month, were scored as follows:

	Technical Score	Price Score	Total (Max. 1000)	Price
LSI:	483	300	783	$175,158
IVI:	565	198	763	$261,752

Based on these results, the agency determined that the contract should be awarded to LSI; by letter dated February 27, USDA advised all apparently unsuccessful offerors that LSI had been selected and, as discussed below, inadvertently stated LSI's offered price. Before actually making the award, USDA determined that LSI's BAFO did not reflect the correct quantity of journal articles required to be indexed. Prior to the request for BAFOs, that quantity had been increased from 5,000 to 6,000 articles by an amendment first communicated verbally to LSI and IVI in the February discussions, and later confirmed in writing on February 15. LSI's BAFO, however, reflected only the smaller, original quantity. USDA concluded that the amendment had not been sufficiently clear, that LSI's proposal could not be accepted as submitted, and that negotiations should be reopened with all offerors. Accordingly, the agency issued another amendment that, in its view, more clearly stated the revised requirement for 6,000 articles, and called for a second round of BAFOs. Those BAFOs, submitted on March 13, were scored as follows:

	Technical Score	Price Score	Total (Max. 1000)	Price
LSI:	483	300	783	$181,494
IVI:	565	270	835	$201,128

Based primarily on the fact that IVI had substantially lowered its price (its technical score was unchanged), the agency awarded the contract to IVI on May 30.

LSI protested the contract award to our Office on June 10,[1] explaining that it had just learned from another party that the agency's February 27 preaward notification letter had improperly disclosed LSI's price to the other offerors. (LSI, as the prospective awardee, had not been sent the letter.) LSI asserted that this disclosure of its price provided its competitors with an improper competitive advantage, and therefore rendered invalid the award to IVI which was based on the second round of BAFOs.

In response to LSI's protest, the agency reviewed its files and determined that the February 27 preaward letter had in fact included a reference to LSI's proposed price. The letter was intended to satisfy Federal Acquisition Regulation (FAR) § 15.1001(b)(2), which requires the agency in a small business set-aside to provide preaward notice of the successful offeror so that, where appropriate, an unsuccessful offeror may file a timely challenge of the prospective awardee's size status with the Small Business Administration (SBA). USDA's letter, however, inadvertently included additional information that was required by another FAR provision, § 15.1001(c)(1), relating to postaward notifications. Specifically, the letter indicated that 104 prospective offerors had been solicited, that 4 proposals had been received, and that the price on which award to LSI was based was $75,158. (LSI's indicated price was a typographical error; however, IVI states that it realized the figure was erroneous, and learned of the correct price, $175,158, from the contracting officer.)

USDA concluded that the disclosure of LSI's low price had given IVI an improper competitive advantage in the subsequent round of negotiations, and that the firm's substantially lowered price may have reflected that advantage. Consequently, on August 5, the agency terminated IVI's contract for the convenience of the government, and advised the firm that it intended to recompete the requirement. IVI's protests followed.

IVI asserts that the decision to terminate its contract and recompete the requirement is unreasonable. The protester asserts that, contrary to the agency's position, the disclosure of LSI's price provided no assistance to IVI in the competitive process, since the number of documents that LSI was proposing to index for that price was not disclosed. On

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[1]LSI's initial protest was assigned file No. B-241441.2; it was closed administratively and subsumed under file No. B-241441.3 on July 1, when LSI supplemented the original protest. That protest, in turn, was dismissed as academic on August 2, when, as discussed below, our Office was advised of the agency's corrective action.

the other hand, now that the contract price has been disclosed, IVI asserts that it would be improper to proceed with the recompetition proposed by the agency, which will put IVI at a competitive disadvantage and result in an auction. Consequently, the protester states that its contract should be reinstated. In the alternative, IVI argues that it should receive a contract award on the basis of its first BAFO, since its proposal was the only one of the four submitted that was fully responsive to the agency's revised requirement for the indexing of 6,000 articles.[2]

A decision to terminate a contract for the convenience of the government is a matter of contract administration which our Office generally does not review; however, we will review the propriety of a contract termination where the termination is based on the agency's conclusion that the original contract award was improper, and the protester is challenging that conclusion. Norfolk Shipbuilding and Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 CPD ¶ 667. Where, as here, the agency terminates a contract and resolicits for its requirement, it is in effect canceling the RFP, and we will determine the propriety of the agency action by applying the rules pertaining to the cancellation of a solicitation. See generally HBD Indus., Inc., B-242010.2, Apr. 23, 1991, 91-1 CPD ¶ 400. An agency has a proper basis for canceling an RFP and resoliciting where the record contains plausible evidence or a reasonable possibility that not doing so would be prejudicial to the government or the integrity of the competitive system itself. See Meisel Rohrbau GmbH & Co. KG, 66 Comp. Gen. 383 (1987), 87-1 CPD ¶ 414; General Projection Sys., B-241418.2, Mar. 21, 1991, 91-1 CPD ¶ 310.

We find that cancellation here was warranted. It is fundamental to the competitive system that an offeror's prices must not be disclosed, and such disclosure is specifically prohibited by regulation. See FAR § 15.610(d)(3); Wylie Mechanical, B-228695.4, Aug. 4, 1989, 89-2 CPD ¶ 107. Disclosure of one offeror's price is inconsistent with the principle that offerors must be allowed to compete on an equal basis. See generally Carson Optical Instruments, Inc., B-228040, Oct. 19, 1987, 87-2 CPD ¶ 373 (termination

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[2]Initially, IVI also argued that it should have been awarded a contract on the basis of its first BAFO because its proposal was the most highly rated. That claim, however, was based on the agency's having erroneously advised IVI that its proposal had been scored higher than LSI's. As noted above, this was not the case. After the agency explained in its report on the protests that LSI was more highly scored, IVI abandoned this argument.

and resolicitation proper where, as a result of defects in procurement, offerors were not competing on a common basis, and agency therefore did not enjoy the full benefits of competition); MicroSim Inc.--Recon., B-234035.2; B-234035.3, Oct. 11, 1989, 89-2 CPD ¶ 336 (agency's failure to assure that offerors were competing on a common basis clearly could have affected outcome of competition). We conclude that offerors here did not compete on an equal basis due to disclosure of LSI's price, and that the agency therefore reasonably determined that the integrity of the competitive system had been undermined, justifying the cancellation. General Projection Sys., supra.

Our conclusion is consistent with our prior decisions in similar circumstances. For example, Swedlow, Inc., 53 Comp. Gen. 564 (1974), 74-1 CPD ¶ 55, involved circumstances very similar to those here; upon discovery that the price of the offeror that had been low at the close of the first round of negotiations had been revealed prior to the second round, we found that cancellation of the RFP and resolicitation were appropriate. Similarly, in Wylie Mechanical, supra, we held that the agency properly decided not to exercise an option but instead to resolicit for the remainder of its requirement, where, subsequent to award and the commencement of performance, the agency realized that the prices in the protester's initial proposal had been mistakenly disclosed to the awardee before BAFOs had been submitted, in violation of FAR § 15.610(d)(3)(ii).

We find unpersuasive IVI's argument that LSI's disclosed price did not have an actual influence on its own BAFO, because IVI did not know the requirements that LSI was proposing to meet at that price. It is virtually impossible to determine the factors entering into an offeror's decision to modify its proposal in a particular way; such decisions are business judgments and may reflect all kinds of factors related to the business needs of the offeror. The legal standards discussed above in effect acknowledge this situation by requiring only that the record contain a reasonable possibility of prejudice to the integrity of the competitive system. General Projection Sys., supra. Consequently, since it is not possible to confirm that IVI's large price reduction[3] in its second BAFO was not influenced by LSI's disclosed price, this argument does not change our conclusion.

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[3]The reduction resulted in an increase in IVI's price score of approximately 27 percent, enough to displace LSI as the highest ranked offeror. (Technical scores did not change.)

We also reject IVI's contention that the termination of its contract and the proposed recompetition are improper since, now that its own price has been exposed, IVI will be at a competitive disadvantage in the new competition. The need to preserve the integrity of the competitive system, and to promote competition on an equal basis, outweighs any possible competitive disadvantage to an initial awardee that will result from disclosure of its price where a recompetition is necessary to correct an impropriety in the original award. Unisys Corp., 67 Comp. Gen. 512 (1988), 88-2 CPD ¶ 35; see HBD Indus., Inc., supra.

We dismiss as untimely IVI's alternative argument that it should have received an award on the basis of its first BAFO, since its proposal was the only one that was "responsive." The record shows that, when IVI received USDA's request for a second round of BAFOs, it filed a protest with the agency arguing that the second round was neither necessary nor proper, since LSI's first offer should be rejected as nonresponsive, and LSI should simply be eliminated from further consideration, with award then going to the next offeror in line (presumably, IVI). The agency rejected IVI's arguments in an April 5 letter, which stated in part the contrary view that "if an offer does not conform to material requirements of the Statement of Work, further discussion is permitted to make the offer responsive to the government's requirement."

Our Bid Protest Regulations require that a protest be filed with our Office not later than 10 days from the time the protester learns that the contracting officer has denied an agency-level protest. 4 C.F.R. § 21.2(a)(3) (1991); Hogan Property Co., B-242795; B-242795.2, June 7, 1991, 91-1 CPD ¶ 549. If, after being advised of the agency's adverse interpretation, IVI still believed that LSI's proposal should have been rejected as "nonresponsive," with award going to the next offeror in line, it was required to protest these matters not later than 10 days after receiving the April 5 denial of its agency-level protest. Id. Since, however, IVI did not raise the issues until it filed these protests 4 months later, the allegations are dismissed as untimely.

In any event, as the agency advised IVI, there is nothing improper in reopening discussions with an offeror whose proposal is not fully acceptable as submitted. See Keystone Eng'g Co., B-228026, Nov. 5, 1987, 87-2 CPD ¶ 449. The agency was not required to reject LSI's first BAFO and exclude the firm from the competitive range simply because it failed to propose on the revised (increased) quantity of journal articles. Even if, as IVI argues, that failure rendered LSI's offer unacceptable, an agency is not required to reject a nonconforming BAFO when it determines it is not

in the government's best interest to do so. Id.; Standard Mfg. Co., 65 Comp. Gen. 451 (1986), 86-1 CPD ¶ 304. In this case, the agency decided it was preferable to retain LSI in the competitive range and reopen negotiations with it and the other offerors, rather than to reject the offer outright and make award to a higher priced offeror. This decision was reasonable. See Keystone Eng'g Co., supra.

The protests are denied in part and dismissed in part.

Robert P. Murphy

for James F. Hinchman
General Counsel