

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

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Decision

Matter of: Associated Tool Company, Inc.

File: B-247011

Date: April 21, 1992

Sanford W. Faulkner, Esq., Rives & Peterson, for the protester.

Mary E. Clarke, Esq., Defense Logistics Agency, for the agency.

Jeanne W. Isrin, Esq. and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that inordinate number of solicitation amendments and delays in procurement process created likelihood that protester's price improperly was disclosed to low and second-low offerors is dismissed where (1) protest based on the delays was not raised at the time they occurred, and thus is untimely; (2) there is no evidence that amendments and delays were not necessary, or that agency otherwise proceeded improperly; and (3) there is no evidence, other than mere speculation, that protester's prices were disclosed.

DECISION

Associated Tool Company, Inc. protests the award of a contract to Atlantic Industries, Inc. under request for proposals (RFP) No. DLA120-90-R-3071, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency, for 5,811 field surgical scrub sinks.¹

We dismiss the protest.

The solicitation was issued on September 28, 1990. Due to various circumstances, the procurement process was delayed several times. Amendment 0001, issued on October 17, extended the closing date from October 31 to November 30. On November 8, amendment 0002 was issued to make

¹The sinks are used in military field hospitals and are part of the Deployable Medical Systems (DEPMEDS) program.

administrative and specification changes to the solicitation. Of 12 initial offers received, Associated's was low, and a preaward survey was requested for it on December 7.

On December 18, before the award could be made to Associated, DPSC issued a second RFP (No. DLA120-91-R-0432) for an emergency procurement of 200 field surgical scrub sinks, in support of Operation Desert Shield. All the firms that had offered on the initial RFP were solicited and advised that the original RFP was on hold until the emergency buy was completed. On December 21, Associated was awarded the emergency contract, which it completed in January 1991.

On April 29, 1991, amendment 0003 was issued to reactivate the initial RFP and to make changes to the specification and packaging requirements shown to be necessary during the emergency procurement. On July 26, amendment 0004 was issued, deleting numerous clauses, incorporating many other standard clauses, clarifying the quantity requirements for certain accessory items, revising the delivery schedule, and extending the closing date for revised proposals to August 2. This amendment also reduced the first article testing (FAT) requirement from 200 to 5 units, since the specifications were deemed to have been adequately tested during the emergency procurement. Amendment 0005 then was issued to extend the closing date for revised offers to August 9, at the request of one of the offerors for additional time.

Eleven revised offers were received; Atlantic now was the apparent low offeror. A preaward survey was conducted on Atlantic at this point, which resulted in a recommendation for award to that firm on September 4. On September 26, however, the RFP again was amended (amendment 0006). This amendment clarified ambiguities in the delivery schedule, erroneously (DPSC states now) reinstated the 200 unit FAT, and set October 4 as the new closing date for revised proposals. When DPSC became aware of the FAT error, it issued amendment 0007 to correct the FAT requirement to 5 units. The amendment also deleted some items, and extended the closing date for revised proposals based on the changes to October 9. Nine revised proposals were received and Atlantic was again the apparent low offeror.

At this juncture, DPSC decided that discussions were necessary; it thus conducted discussions with all firms in the competitive range from October 23 through 31. When best and final offers (BAFO) were received on November 6, Atlantic still was the low offeror. Atlantic subsequently was found responsible, and the firm received the award on November 29. Since the agency received notice of the

protest more than 10 days after award, performance has not been suspended.

Associated maintains that the procurement spanned an inordinate length of time and involved an excessive number of amendments, requests for offers, and extensions of closing dates; that this created an environment conducive to disclosure of its pricing and other proprietary data; and that such improper disclosure likely occurred, putting Associated at an unfair competitive disadvantage and creating an improper auction.

DPSC acknowledges the unusual number of delays in the procurement process. It explains that the delays, amendments, closing date extensions, and requests for revised proposals were attributable to inexperience in purchasing scrub sinks, the effects of the emergency acquisition necessitated by Operation Desert Shield/Storm, and the Army's subsequent attempt to improve the specifications based on the emergency procurement experience. The agency denies, however, that it ever disclosed pricing or other proprietary information or that the delays otherwise rendered the award invalid.²

We find that the protest fails to state a valid, timely basis for protest. First, if Associated believed that the amendments, extensions of closing dates, and requests for revised proposals or BAFOs were unwarranted, it should have so alleged at the time they occurred. Our Bid Protest Regulations require that protests of such alleged solicitation improprieties be filed prior to the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1992), as amended by 56 Fed. Reg. 3759 (1991); Byrne Indus., Inc., B-239200, Aug. 13, 1990, 90-2 CPD ¶ 122.

In any case, Associated has cited no evidence of any impropriety by DPSC. We have found numerous amendments and successive rounds of discussions not objectionable per se, where they are justified and neither technical leveling nor

²DPSC also argues that, whereas Associated was only third-low offeror, it is not an interested party to maintain the protest under our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.2(a) (1992). However, since Associated is claiming wrongful disclosure of proprietary data to both the low and second-low offerors, the remedy in the event the protest is sustained would be reprocurement, in which case Associated would be eligible to compete, and we find it therefore sufficiently interested to maintain the protest. See Automation Mgmt. Consultants Inc., B-243805, Aug. 29, 1991, 91-2 CPD ¶ 213.

technical transfusion has been shown. See, e.g., TEK, J.V. Morrison-Knudsen/Harnischfeger, B-221320; 9-221320.2, Apr. 15, 1986, 86-1 CPD ¶ 365. While there were an unusual number of delays in the procurement, all of them have been adequately explained. Specifically, all of the amendments appear to have been necessitated by either a need to correct a solicitation deficiency or, in one case, to afford offerors more time to submit their revised proposals, and the suspension of the process for the emergency buy was necessitated by the Operation Desert Shield mobilization effort.

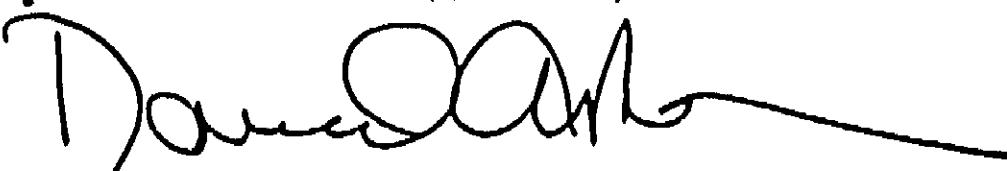
Similarly, the record contains no evidence that Associated's prices were disclosed. Even if the procurement delays increased the possibility of an inadvertent or other disclosure of one or more offeror's prices, the mere existence of this increased possibility does not constitute proof that a disclosure actually occurred. See generally, H.E. Cramer Co., Inc., B-212015.2, Jan. 24, 1984, 84-1 CPD ¶ 111. As evidence of disclosure, Associated points to the fact that the BAFOs of Atlantic and the second-low offeror, Doninger Metal Products Corporation, on the subject solicitation were priced substantially below those firms' prices for the emergency buy. Although the record does show such reductions, this does not establish that Associated's prices were disclosed. First, the emergency procurement was an altogether different procurement which bears no direct relationship to the procurement at issue. In any case, a reduction in an offeror's price in response to a request for BAFOs does not establish that a competitor's price was revealed. See Keystone Eng'g Co., B-228026, Nov. 5, 1987, 87-2 CPD ¶ 449; Le-Don Computer Servs., Inc., B-225451, Jan. 9, 1987, 87-1 CPD ¶ 46. Furthermore, neither Atlantic's nor Doninger's revised or BAFO prices were lower than Associated's initial proposal price; there thus is no reason to believe other offerors were privy to Associated's initial price. Likewise, Atlantic's and Doninger's revised proposal prices--which became low because they reduced their prices while Associated increased its initial price--could not have been influenced by any alleged disclosure of Associated's revised price, since the firms' revised prices were submitted at the same time.

Associated maintains that the BAFOs of Atlantic and the second-low offeror are not realistic. Where fixed-price contracts are solicited, as in this case, "cost realism" ordinarily is not considered in the evaluation since a firm, fixed-price contract provides for a definite price and this contract type places upon the contractor the risk and responsibility for all contract costs and resulting profit or loss. Binghamton Simulator Co., Inc., B-244839, Nov. 5, 1991, 91-2 CPD ¶ 429. An agency may, in its discretion, provide for a cost realism analysis in the solicitation of

firm, fixed-price proposals for such purposes as measuring an offeror's understanding of the solicitation requirements, Id., but there was no such requirement in this case. Associated is essentially arguing that Atlantic cannot perform the contract at its offered price, which concerns the agency's affirmative determination of Atlantic's responsibility. We will not consider such arguments under the circumstances here. See 4 C.F.R. § 21.3(m)(5); Logistics Operations, Inc., B-24072&.4, June 4, 1991, 91-1 CPD ¶ 526.

Associated further maintains that Atlantic actually intends to substitute a heater unit and a shipping container which do not meet contract specifications in performing the contract. Whether an awardee intends to perform the contract in accordance with the terms is a matter of contract administration and as such is not encompassed by our bid protest function. See 4 C.F.R. § 21.3(m)(1) (1992), as amended by 56 Fed. Reg. 3759 (1991); BUR-TEL Sec. Protection Sys., B-218829, May 16, 1985, 85-1 CPD ¶ 561.

The protest is dismissed.



David Ashen
Acting Assistant General Counsel