Evans

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

147014

Decision

Matter of: Atlantic Research Corporation

File: B-247650

Date: June 26, 1992

Paul M. Vincent, Esq., Ober, Kaler, Grimes & Shriver, for the protester.
Mark A. Ferrin, Esq., for Thiokol Corporation, an interested party.
Richard A. Lisker, Esq., Department of the Navy, for the agency.
Catherine M. Evans, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's decision to make single award to another offeror rather than to negotiate with protester for purpose of making a split award at a reasonable price premium was proper where solicitation provided for single award if price premium for split award was considered excessive, and agency reasonably concluded that negotiations would not result in a substantial reduction in the premium.

DECISION

Atlantic Research Corporation (ARC) protests the Department of the Navy's decision to award a single contract to Thiokol Corporation under request for proposals (RFP) No. N00024-91-R-5356, issued by the Naval Sea Systems Command for MK 104 Dual Thrust Rocket Motors (DTRM). ARC alleges that the terms of the RFP and the Navy's prior course of dealing required the agency to make a split award, or at least to negotiate so as to afford ARC a fair opportunity at a partial award, instead of awarding the entire requirement to Thiokol.

We deny the protest in part and dismiss it in part.

BACKGROUND

The DTRM was originally developed and produced by Thiokol on a sole-source basis from 1978 to 1988, when ARC became qualified as a second source. Since 1988, the Navy has made split awards to Thiokol and ARC in order to maintain competition. The RFP solicited fixed prices for a basic

quantity of 488 units for fiscal year 1991, and option quantities of 330 units each for fiscal years 1992 and 1993. In general, the RFP, consistent with the prior competitive solicitations, provided for two awards based on the quantity combination (70/30 percent, 60/40 percent, or 50/50 percent) that would result in the lowest combined evaluated price. Where the lowest combined price resulted from a 70/30 or 60/40 split, the solicitation required that the price for the 70 or 60 percent award be the lowest price offered for that quantity. If, however, the price premium associated with making two awards was considered excessive, the RFP provided for a single award to the offeror with the lowest price for 100 percent of the requirements. Specifically, section M of the RFP stated, in relevant portion, that:

"1. The following considerations . . . will guide the Navy in making award(s) under this solicitation:

> "a. A willingness to pay a reasonable premium in order to make two awards as opposed to one award for 100% of the total requirements.
>
> "b. An interest in ensuring that, (1) if two awards are made . . . that the majority quantity award is made to the offeror with the lowest evaluated price for such quantity. . . .

"2. Except as otherwise provided herein, it is the intention of the Navy to award two (2) firm-fixed-price/performance incentive contracts as a result of this solicitation based on the alternate award combination . . . which results in the lowest combined evaluated price to the government, provided that the greater than 50 percent portion of the requirement . . . is awarded to the offeror with the lowest evaluated price for the greater than 50 percent portion being considered for award. However, the government reserves the right to award all requirements to the offeror with the lowest evaluated price for 100 percent of the requirement:

> "a. if the price premium associated with making two awards . . . is considered excessive.
>
> . . . . .

> "4. The government may award a portion of the requirement (an award alternative) to one offeror at the offeror's proposed price for such award alternative and enter into negotiations with the second offeror for the complementary balance of the requirements. A decision to proceed in this manner would be based on a judgment (a) that the second offeror's proposed price for the complementary balance was excessive, or (b) that it is otherwise in the government's best interest to negotiate with the second offeror for the complementary balance of the requirement. An excessive price determination may be based on . . . the price premium for maintaining two sources at the proposed prices. . . . If negotiations with the second offeror are not satisfactorily concluded within 60 days of the award to the first offeror, the government reserves the right to either (a) make an additional award to the first offeror for the complementary balance of the total requirement such that the first offeror will have been awarded 100 percent of the total requirement at the offeror's proposed price for 100 percent of the total requirement, or (b) make no award at all to either offeror for the complementary balance of the total requirement. . . ."

Both ARC and Thiokol submitted proposals in response to the solicitation; the Navy held discussions with and requested best and final offers (BAFO) from each offeror. In evaluating BAFOs, the Navy determined that the lowest combined price for a split award under the above evaluation scheme resulted from a 70-percent award to ARC and a 30-percent award to Thiokol. However, Thiokol's price for 100 percent of the requirement was substantially lower (37 percent) than the 70/30 ARC/Thiokol combined price. The contracting officer determined that the premium for making a split award, which exceeded the 10 to 11 percent premiums the Navy had paid for dual awards in the previous two DTRM procurements, was excessive. Further, the contracting officer determined that negotiations with Thiokol for the lesser, "complementary" quantity would not result in so significant a price reduction as to result in a reasonable price for a split award. Accordingly, the contracting officer made a 100-percent award to Thiokol. ARC thereupon filed this protest with our Office.

ADMISSION TO PROTECTIVE ORDER

Pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(d) (1992), our Office issued a protective order covering material related to the agency's process for selecting Thiokol as the awardee. ARC's general counsel, Carlyle C. Ring,

applied for access under the order to the protected information.

In determining whether counsel may be permitted access to protected material, we look to whether the attorney is involved in competitive decisionmaking for the client, that is, whether the attorney's activities, associations, and relationship with the client are such as to involve advice and participation in any of the client's decisions made in light of similar or corresponding information (pricing, product design, etc.) about a competitor. TRW, Inc., B-243450.2, Aug. 16, 1991, 91-2 CPD ¶ 160; see U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984). Where the attorney is involved in competitive decisionmaking, the attorney will not be granted access to the proprietary data of another firm because there is an unacceptable risk of inadvertent disclosure of the protected material. See U.S. Steel Corp. v. United States, 730 F.2d at 1468. In determining whether to grant access to protected material, we consider such factors as whether the attorney primarily advises on litigation matters or also advises on pricing and production decisions, including the review of bids and proposals; the degree of physical separation and security with respect to those who participate in competitive decisionmaking; and the level of supervision to which the in-house counsel is subject. Earle Palmer Brown Cos., Inc., 70 Comp. Gen. 667 (1991), 91-2 CPD ¶ 134; see US Sprint Comms. Co. Ltd. Partnership, B-243767, Aug. 27, 1991, 91-2 CPD ¶ 201.

We denied Mr. Ring's application for access to protected material. While Mr. Ring represented that he is not involved in competitive decisionmaking for government procurements, and does not provide advice to competitive decisionmakers on government procurement matters except in very limited circumstances, he acknowledged that he is involved in competitive decisionmaking with respect to other business matters such as mergers and acquisitions. For example, Mr. Ring stated that he had been involved in merger negotiations between ARC and a Thiokol competitor. In addition, Mr. Ring stated that he provides advice to competitive decisionmakers with respect to commercial contracts. Based on these representations, we concluded that Mr. Ring's activities and his relationship with ARC could involve advice and participation in corporate decisions made in light of similar or corresponding information about Thiokol; we concluded therefore that the risk of inadvertent disclosure of Thiokol's proprietary information was unacceptable, and precluded granting Mr. Ring access to that information. See TRW, Inc., supra; U.S. Steel Corp. v. United States, 730 F.2d at 1468.

DISCUSSION OF PROTEST ISSUES

ARC objects to the agency's award decision on several grounds. First, ARC alleges that the Navy's action was in breach of an implied contract with the firm to make two awards and inconsistent with the Navy's longstanding policy to maintain two sources for its DTRM requirements. ARC also asserts that the Navy violated the terms of the RFP by concluding that the premium associated with making a split award was excessive without first holding price negotiations with the offerors in order to reduce the premium and without considering the likely future cost of sole-source contracts.

As explained below, we find ARC's arguments to be without merit, and conclude that the Navy's decision to award 100 percent of its DTRM requirements to Thiokol was reasonable and consistent with the RFP.

Breach of Implied Contract/Abandonment of Dual-Source Policy

ARC notes that since 1985, the Navy has repeatedly expressed its intent to maintain dual sources for its DTRM requirements, and since 1988, when ARC became qualified as a second source, has implemented this policy by making split awards. ARC asserts that it relied heavily upon the Navy's stated commitment to dual sources by investing $24 million to become qualified as a second source, and contends that the Navy's single award to Thiokol amounts to a breach of an implied contract to continue maintaining two sources. ARC also alleges that if the Navy intended to abandon its dual-source policy, it should have informed the offerors that this was the case.

We will not consider these issues. Even assuming that the Navy was obligated under an implied-in-fact contract with ARC to maintain dual sources, a contractor's rights under an existing contract are a matter of contract administration that is outside the scope of our bid protest function. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1); Embassy Air Express, B-239920.2, Dec. 20, 1990, 90-2 CPD ¶ 508. As to the Navy's alleged failure to notify offerors of a change in its dual-source policy, we note again that the RFP expressly advised offerors of the possibility of a single award. If ARC believed the award provision was improper, it should have protested the provision before the time set for receipt of initial proposals; any post-award challenge to an alleged solicitation impropriety is untimely. 4 C.F.R. § 21.2(a)(1).

Compliance with RFP

ARC does not dispute the Navy's determination that a 37-percent price premium was excessive. Rather, ARC asserts

that section M of the RFP required the agency to hold price negotiations with ARC in order to reduce the premium before awarding a single contract to Thiokol for 100 percent of the requirement. In support of its position, ARC cites the provision that a decision to conduct negotiations would be based on "a judgment that the second offeror's proposed price for the complementary balance was excessive." ARC asserts that the Navy made such a determination here, and that determination "triggers the opportunity for [ARC] to achieve a reasonable price" through negotiations.

The Navy maintains that ARC has misinterpreted the RFP. According to the Navy, the solicitation in this regard is permissive rather than mandatory because it states that the agency "may" conduct negotiations in certain cases. Moreover, the Navy contends, there was no need to invoke the negotiation provision because neither offeror's prices for the split-award quantities were considered excessive. Furthermore, the Navy asserts, ARC incorrectly assumes that it is the "second offeror" whose "proposed price for the complementary balance" would have been subject to negotiation if it had been found to be excessive. To the contrary, the Navy explains, since the lowest split-award combination consisted of a 70-percent award to ARC and a 30-percent award to Thiokol, and ARC offered the lowest evaluated price for the 70-percent portion, ARC would have been entitled to award for the 70-percent portion without negotiations, and Thiokol, not ARC, would have been the second offeror with which the Navy would have conducted negotiations for the complementary balance. The Navy determined, however, that not only was Thiokol's price not excessive, but that in any case, as a result of the magnitude of the initial premium for a split award, negotiations with Thiokol were not likely to result in a reduction in the split-award premium to an acceptable level. Under these circumstances, the Navy concludes, it was not required by the RFP to conduct negotiations with any offeror, but instead could properly proceed, as it did here, with a 100-percent award to Thiokol at the lowest price.

Where, as here, a dispute exists as to the actual meaning of a solicitation requirement, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Aerojet Ordnance Co., B-235178, July 19, 1989, 89-2 CPD ¶ 62. To be reasonable, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Id.

As noted by the Navy, in providing that the agency "may" conduct negotiations for the complementary balance with the "second offeror," the solicitation permitted, but did not require, the agency to conduct such negotiations. We

conclude that the Navy did not abuse its discretion in this regard by not conducting negotiations. First, we find untenable ARC's assertion that it was the "second offeror" with whom negotiations would have been held. The solicitation states that a split award will be based on the lowest combination price, provided that the proposed awardee for the larger portion of the requirement is offering the lowest price for that quantity. Thus, under the solicitation, in the event of a split award, award first was to be made to ARC as the offeror with the low price for the majority portion of the low priced split-award combination. In other words, as argued by the Navy, Thiokol, not ARC, was the "second," "complementary" offeror.

ARC argues in the alternative that if the Navy's interpretation of the negotiation provision is correct--i.e., that Thiokol and not ARC was the "second offeror"--then the Navy was required to negotiate with Thiokol. ARC challenges as unreasonable the Navy's determination that negotiations would not be in the government's best interest because Thiokol was not likely to reduce its price enough to achieve an acceptable split-award premium.

Here, the Navy based its conclusion that negotiations with Thiokol were not in the government's best interest on Thiokol's audited cost estimates for the previous procurement. The Navy calculated that, even if Thiokol would have been willing to perform the 30-percent portion of the requirement at cost, the combined price for awards to Thiokol and ARC still would represent a 24-percent premium over Thiokol's price for 100 percent of the requirement; in order to reach a premium (approximately 10 percent) acceptable to the Navy, Thiokol would have had to reduce its offered price by 42.4 percent and incur a substantial loss. The Navy concluded, reasonably in our view, that the desired below-cost price was "out of the negotiable range." While ARC argues that the Navy should not have assumed that Thiokol would not be willing to incur a substantial loss because its offered price for the 100-percent quantity was below cost, the fact that Thiokol may have been willing to incur a loss in order to receive an award for 100 percent of the requirement in no way demonstrates that it would have been willing to incur a substantial loss for only 30 percent of the requirement.

ARC further argues that even if the Navy was not required to conduct negotiations with either offeror, the agency unreasonably ignored the possibility that negotiations with both offerors could have reduced the split-award premium to an acceptable level. Again, we do not think the Navy acted unreasonably in concluding that the split-award premium was excessive without first conducting price negotiations. First, the RFP here expressly provided for negotiations only

with one offeror, not both. Furthermore, we have consistently stated that offerors are to submit their best prices at the first opportunity or run the risk of being excluded from further competition for the award, Aerojet Ordnance Co., supra. We think this is especially true where, as here, price is the primary evaluation factor for award and the solicitation provides for award on the basis of initial proposals. Thus, it was reasonable for the Navy to assume that offerors had submitted their best prices in their initial proposals such that reductions of the magnitude necessary to make split awards desirable could not realistically be expected.

ARC also asserts that the Navy's decision not to negotiate ignored the potential cost of future sole-source procurements. According to ARC, it will lose its qualification status and will not be eligible to compete in future procurements for this item if the 100-percent award to Thiokol is allowed to stand; once Thiokol is restored to its former status as the only qualified source for DTRMs, ARC contends, Thiokol will raise its prices.

Contrary to ARC's assertion, the record shows that the Navy did, in fact, consider the potential cost of future sole-source procurements in the award decision. The Navy found that, based on the uncertainty of future DTRM requirements caused by the end of the Cold War, it was unable to conclude that a split-award price premium would be recouped through possible savings over the cost of future sole-source procurements. While ARC disagrees with the agency's exercise of business judgment, which favored the certain and substantial cost saving of a 100-percent award to Thiokol over the mere possibility of future savings, we do not find this judgment unreasonable.

OTHER ALLEGATIONS

ARC also alleges that Thiokol's offer was unbalanced, as it contained below cost prices. To be rejected as unbalanced, an offer must be both mathematically and materially unbalanced. To be mathematically unbalanced, however, an offer must contain understated prices for some items and overstated prices for other items. Allegations of understated prices, without any indication of overstated prices, offer no basis for concluding that an offer was mathematically unbalanced. See OMSERV Corp., B-237691, Mar. 13, 1990, 90-1 CPD ¶ 271. Since ARC does not allege (and apparently does not believe) that Thiokol's offer contained any overstated prices, we will not consider its allegation of unbalancing.

ARC also alleges that the Navy improperly accepted Thiokol's below-cost offer without informing ARC that it would accept such offers. However, an agency may properly accept a

below-cost offer, see Atlantic Maintenance, Inc., B-239621.2, June 1, 1990, 90-1 CPD ¶ 523, and we are aware of no requirement for it first to advise potential offerors of this fact.

Finally, ARC asserts that it should have been awarded additional contract line items for spare DTRMs and containers because its prices were low for those items. We disagree. While the RFP generally called for award of these line items to the low offeror for each item, it also specifically stated that if a single, 100 percent award rather than a split award was made for the primary DTRM quantities, the additional items could be awarded to the sole awardee. Thus, the Navy's decision to award the additional items to Thiokol, the awardee for 100 percent of the primary DTRM quantities, was consistent with the RFP. If ARC objected to this provision, it was required to protest before the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

CONCLUSION

Based on the foregoing, we conclude that the Navy's decision to award 100 percent of its DTRM requirements to Thiokol was reasonable and consistent with the RFP. The RFP provided for a single award in the event of an excessive price premium for a split award; the Navy considered the 37-percent split-award premium excessive, and determined that it was unlikely to negotiate a reasonable premium. We find these determinations reasonable.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel