McArthur
150323

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of the Army--Reconsideration

File: B-251527.3

Date: September 17, 1993

Michael A. Hordell, Esq., and Eric L. Lipman, Esq., Petrillo & Hordell, for the protester.
Gerard F. Doyle, Esq., Doyle & Bachman, for Systems Resources, Inc., an interested party.
Kenneth John Allen, Esq., Department of the Army, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of decision sustaining protest against acceptance of initial proposal, where offeror submitted a late best and final offer, is denied where request identifies no errors of law or fact in the previous decision.

DECISION

The Department of the Army requests reconsideration of our decision, CCL, Inc., B-251527; B-251527.2, May 3, 1993, 93-1 CPD ¶ 354, in which we sustained a protest against the award of contracts to Systems Resources, Inc. (SRI) under request for proposals (RFP) No. DAEA08-92-R-0011, for computer hardware maintenance services. In that decision, we found that the agency improperly made award on the basis of SRI's initial proposal, which had expired.

We deny the request for reconsideration.

On May 29, 1992, the agency issued the solicitation for firm, fixed-price contracts for a base year, with a 1-year option period, to provide on-site preventive and remedial maintenance for government-owned NCR Comten communications processors and Amdahl mainframe computers at four Army information processing centers and associated data processing installations located worldwide. The solicitation provided that the agency would make separate awards for each center and its associated installations, to the lowest cost, technically acceptable offerors.

The solicitation contained the clause at § 252.219-7006 of the Defense Federal Acquisition Regulation Supplement, advising that the agency intended to evaluate offers by adding 10 percent to the cost of all offers except those from small disadvantaged business (SDB) concerns. Pursuant to the clause, an SDB concern not waiving the preference agreed to spend at least 50 percent of the cost of personnel for contract performance for its own employees. The solicitation also contained the standard Federal Acquisition Regulation (FAR) § 52.215-10 clause providing for the rejection of late submissions, modifications, and withdrawals of proposals. The first page of the solicitation stated that absent any indication of contrary intent, initial offers would provide a 60-day acceptance period.

Three offerors submitted proposals on July 20. SRI did not take exception to the 60-day acceptance period. Nor did SRI waive the SDB preference, although its proposal indicated that it would subcontract most of the work to Amdahl and NCR, the two original equipment manufacturers (OEM). The proposal stated that "[b]oth subcontractors will provide total hardware and software support as well as a full line of complementary services including field engineering, systems engineering and consulting." The proposal also stated that the OEMs would provide the personnel for routine day-to-day service and would have full responsibility and authority for problem management and resolution. The proposal was essentially based upon subcontracting full responsibility for maintenance to the OEMs.

The contracting officer referred the proposals to a proposal evaluation board, which initially found the awardee's proposal unacceptable and identified issues for SRI to address, in order to conform its offer to solicitation requirements. The agency advised SRI of these issues by letter of August 12, and SRI responded by letter of August 17, with its clarifications, a signed copy of amendment No. 0003 to the RFP (which it had omitted earlier), and revised prices. SRI provided further pricing revisions by letter of September 3.

By letter dated September 11, the agency requested submission of best and final offers (BAFO) by 2:00 p.m. on September 22; the agency also stated that any offeror who did not wish to change its initial proposal should submit a letter so stating. CCL submitted a timely BAFO; SRI submitted a BAFO, but it was received after the time set for receipt of BAFOs. The agency decided that it would not consider SRI's BAFO because it was late. Although SRI had submitted an initial proposal--subsequently modified by its letters of August 17 and September 3--the acceptance period for that proposal had already expired. Nevertheless, the agency agreed with SRI to evaluate and consider its initial

proposal, as modified by the subsequent correspondence, for award.

SRI's September 3 prices were low for one of the four awards, and with the application of the 10-percent preference to CCL's price, were low enough to displace the protester's proposal for awards at the other three locations. Since application of the 10-percent preference was critical in determining the awardee, the contract specialist spoke with SRI by telephone on October 2 concerning SRI's entitlement to the preference. According to her notes of the conversation, SRI stated that it would "bear all management cost[s] (handling telephone calls, coordinating maintenance personnel, preparing reports, etc.)" and that SRI has a "few maintenance technicians." SRI did not further identify those personnel or what functions they would perform, and the agency did not pursue the matter further.

The agency took no further action until it awarded a contract to SRI on November 25. On that date, CCL filed a protest with the agency, challenging SRI's right to the SDB preference. On December 4, before receiving the agency's response, CCL filed this protest with our Office.

CCL argued that it was improper for the agency to consider SRI's initial proposal for award. CCL also contended that SRI would not incur 50 percent of personnel costs for its own employees and that it was unreasonable for the agency to apply the SDB preference without further investigation into how SRI planned to perform.

The agency argued that the terms of the Standard Form (SF) 33, which formed the cover sheet of the solicitation, provided an acceptance period of 60 days, that this acceptance period applied essentially to all subsequent revisions to the offer, and that the agency therefore had the right to accept any offer within 60 days, regardless of an offeror's attempts to withdraw that offer. In our decision, we noted that the awardee's initial proposal had expired by its own terms on September 18, 60 days after its submission and 4 days prior to the date set for receipt of BAFOs. With regard to the agency's argument that the awardee intended to keep its September 3 pricing open for an additional 60-day period, our Office found no evidence of any such intention in SRI's September 3 letter. Further, SRI had subsequently tried to submit a revised proposal, which was received late.

As stated in our decision, the agency's September 11 letter had directed the offerors to respond in one of two ways: either by submitting a BAFO, or by stating that they did not wish to change their initial proposal. Any response to the agency's letter--whether submission of a revised proposal or

a statement that the offeror desired that its initial proposal continue to be considered--had to be received timely, i.e., by the time set for receipt of BAFOs. We concluded that, by submitting its BAFO after the common cutoff time, SRI had failed to follow the ground rules set up by the agency for continued participation in the procurement. Since SRI's BAFO was late, and its initial offer had already expired, we concluded that there was in effect no offer from SRI which the agency could accept. Accordingly, the agency had improperly considered, and ultimately made award based on, SRI's initial proposal as modified by its September 3 letter, and we sustained the protest.[1]

In requesting reconsideration, the agency argues that its September 11 letter, directing the offerors either to submit a BAFO or to submit a letter specifically stating that they did not wish to revise their initial proposals, should not be dispositive of the protest. The agency argues that the language of the September 11 letter is merely precatory and does not suggest that compliance was necessary for continued participation in the procurement.

We do not agree that the language of the September 11 letter had precatory effect only. The fact that the letter was phrased in terms of a "request" for BAFOs reflects only that all requests for proposals--initial, revised, or BAFO--are precatory in the sense that no offeror is ever required to submit a proposal. See MR&S/AME, An MSC Joint Venture, B-250313.2, Mar. 19, 1993, 93-1 CPD ¶ 245. It does not mean, however, that once a vendor submits a proposal it can expect to remain in the competition indefinitely when the proposal by its own terms expires by a date certain and the agency makes it clear that vendors are to either submit BAFOs or explicitly state their desire to remain in the competition or the basis of their initial proposals.

The agency further contends that as a matter of law, there is no basis for our conclusion that SRI's initial proposal expired, since SF 33, the cover sheet to the solicitation, states that each offer remains open for acceptance "if this offer is accepted within ___ calendar days (60 calendar days unless a different period is inserted by the offeror) from the receipt of offers." Although FAR § 52.215-10 allows an offeror to withdraw its proposal by written notice received at any time before award, the agency essentially argues that this provision only applies after the 60-day period has

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[1]Based on our holding that the agency improperly accepted a proposal that had expired, we did not decide the issue whether the agency properly applied the evaluation preference. We did note that based upon the record, the agency's application of the preference was questionable.

passed, that an offeror may not withdraw its offer prior to the expiration of the 60-day acceptance period and that even at that time, an offer remains open for acceptance unless the offeror withdraws it in writing prior to award. The agency argues that the right to withdraw proposals is inconsistent with SF 33 and that it is not the intent of parties to allow proposals to expire without an express notification, received after the 60-day period, that the offer is withdrawn.

The agency appears to argue that during the 60 days after submission of a proposal, the agency may accept it if its terms are more favorable than subsequent revisions--that is, regardless of subsequent price increases or revisions. For example, the agency might have accepted SRI's August 17 pricing at any time prior to October 16, even though SRI had provided revised pricing on September 3. We disagree;[2] by submitting revised pricing on September 3, SRI effectively withdrew its August 17 proposal; by attempting to submit a BAFO, SRI gave evidence that it no longer intended for its September 3 pricing to be available for acceptance. As our prior decision states, absent any indication that SRI intended the September 3 pricing to remain open for 60 days, that offer remains open for no more than a reasonable period, see Western Roofing Serv., 70 Comp. Gen. 323 (1991), 91-1 CPD ¶ 242; it is not reasonable to treat a proposal as remaining open where as here, the offeror has attempted to submit revised pricing.

Once it has engaged in discussions, an agency may not accept a previously submitted proposal; once offerors submit BAFOs, award must be based on the BAFOs and not upon prior versions of the proposals. FAR § 15.611(d); Logitek, Inc., B-238773, July 6, 1990, 90-2 CPD ¶ 16. The subsequent submission of a revised offer or a BAFO acts to extinguish the agency's right to accept the earlier offer, even if the agency attempts to accept that offer within 60 days of its submission. The SF 33 does no more than establish the norm within which an agency may accept an offer; the offeror may withdraw in writing or, as here, submit a revised proposal before the expiration of that period and likewise may extend the period in writing. Once the offer has expired, however,

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[2]As does the awardee, who states, "[a]s the Army correctly observes, any purported commitment under Block 12 of SF 33 to a 60-day acceptance period is directly contradicted by FAR § 52.215-10(h) at paragraph L.7 of the solicitation, which permits withdrawals of offers at any time." Thus, while nominally defending the agency's position, the awardee advances the opposite interpretation.

it may not be revived where revival would prejudice other offerors, as in this case, where CCL submitted a timely, acceptable BAFO that was otherwise in line for award.

While the agency argues that if SRI's offer expired, so did CCL's, its arguments ignore the record. CCL had responded to the agency's request for revised proposals, and had submitted revisions to its proposal as late as September 8, 2 weeks prior to submitting its timely BAFO on September 22. The agency specifically invited CCL's continued participation in the procurement through its request for a BAFO, and unlike SRI, CCL's submission was both timely and in accordance with the ground rules of the solicitation. There is nothing in the record to indicate that CCL took any action that would preclude its subsequent participation in the procurement.

The agency also contends that our characterization of the award as being based on SRI's initial proposal, i.e., award without discussions, was contrary to fact. The reference to initial proposals in our decision merely distinguished between SRI's BAFO and the proposal that was accepted for award; as our decision stated, award was based on the initial proposal, modified by the August 17 letter bringing the proposal into technical conformity with solicitation requirements, and modified further by the September 3 pricing revisions. The context of our earlier decision made this distinction clear and indicates our understanding that SRI had revised both its technical proposal and its price proposal prior to award.

The request for reconsideration is denied.

James F. Hinchman
General Counsel