COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

30366

December 27, 1972

B-176438

099561

vom Baur, Coburn, Simmons & Turtle
1700 K Street, N.W.
Washington, D.C. 20006

Attention: Alan V. Washburn, Esq.

Gentlemen:

By letter dated November 6, 1972, and by prior correspondence, you protested on behalf of Collins Radio Company the award of a contract to Microwave Engineering Inc., under request for proposals (RFP) WA5M-2-7492, issued by the Federal Aviation Administration, Department of Transportion (FAA).

The subject RFP was for retrofit kits for solid state IF amplifier and video modulator kits to replace existing tube type equipment and was negotiated under the authority of 41 USC 252(c)(10), which permits negotiation where it is impracticable to obtain competition. Award was made to Microwave Engineering as the low, technically acceptable offeror on June 30, 1972, notwithstanding the fact that the final Collins offer in the amount of $2,566,925, was some $116,000 lower than the contract price on which award to Microwave was based.

This protest is concerned with the manner in which negotiations were conducted with Collins and peripherally with the substantiveness of certain exceptions taken by Collins during negotiations to the RFP requirements. The pertinent facts in this matter may be briefly summarized. Three of the four proposals submitted by January 18, 1972, the closing date for proposal submission, including that of Collins, were determined to be within a competitive range so as to qualify for negotiation. Initial offers of the three qualified offerors for the amended RFP quantities were as follows:

Microwave Engineering, Inc.	$3,114,329
Terracom	3,558,176
Collins Radio Company	5,053,810

The Government estimate for these quantities was $2,735,000.

Negotiations were conducted with all three offerors within the competitive range with the offers of Microwave and Terracom ultimately determined to be technically acceptable and the Collins proposal rejected as technically unacceptable. Negotiations leading to the determination of

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unacceptability of the Collins proposal were conducted with Collins on April 11, 1972, and in the words of FAA's administrative report "completed by telephone on 25 April 1972." The substance of the April 25 telephone negotiations is not disclosed by the record before us and there is a factual dispute between Collins and FAA as to what was agreed at the April 11 negotiation meeting.

FAA's position in this regard is that Collins was informed of numerous technical qualifications in its proposal which would render the proposal technically unacceptable unless withdrawn or modified and Collins maintains, on the other hand, that it was informed during negotiations that its proposal, including the various technical qualifications, was technically acceptable without change. What is undisputed, however, is that by letter dated April 24, 1972, hand delivered to the contracting officer before issuance of FAA's April 26 telegraphic request for best and final offers, Collins reduced its price and stated that its proposal was subject to technical and other qualifications itemized therein, which qualifications were alleged to have been agreed to at the April 11 negotiation conference.

The FAA administrative report indicates that although the contract negotiator scrutinized Collins' April 24 letter from the standpoint of the Collins price reduction contained therein, as he did the May 1 letter from Collins containing Collins' best and final price offer and reiterating the technical reservations taken by Collins, these letters were not evaluated from an engineering standpoint until May 13, 1972, when the letters were referred to the Chief of FAA's Long Range Radar Branch, notwithstanding the request following receipt of the April 24 Collins letter for best and final offers. On May 19, 1972, some 12 days before award was made to Microwave, the Chief, Long Range Radar Branch advised the contracting officer that the Collins proposal was technically unacceptable because it deviated substantially from RFP requirements in that it offered a guarantee clause different than that called for by the RFP, and failed to meet specification technical requirements in the areas of bandwidth, linearity, envelope delay, and design qualification tests. On the basis of this engineering report, and without extending any additional opportunity to negotiate these exceptions to Collins, the Collins proposal was rejected as technically unacceptable and, as indicated above, award was made to Microwave at a price higher than that finally offered by Collins (i.e., a $2,683,239 final offer from Microwave as opposed to a $2,566,925 final offer from Collins, a difference of $116,314).

The Collins protest is to the effect that all of the deviations from RFP requirements are minor both from the standpoint of their impact on performance and from the standpoint of their impact on price, and that in any event, such deviations were discussed during negotiations and

agreed to by FAA. In the alternative, Collins argues that even if it is conceded that some or all of the deviations were properly determined by FAA to have been substantial, the failure of FAA to advise Collins of this determination before requesting Collins' best and final offer or, failing that, to reopen negotiations before awarding a contract to Microwave was such a serious breach of applicable statutory and regulatory procedures as to warrant termination of the Microwave award. In this regard, Collins now contends that in view of what it considers to be the minor nature of the exceptions taken, it would have freely withdrawn any or all of them had it been informed during negotiations that they were unacceptable to FAA, and that the price impact of such withdrawal would have been insignificant so that Collins' favorable position as low offeror would not have been affected.

In our opinion, the crux of this case lies in the resolution of the factual dispute between FAA and Collins as to what transpired during negotiations because it is our opinion that if, in fact, it were to be determined that Collins was not advised of the unacceptability of its proposal qualifications during negotiations, the failure to so advise the company before requesting best and final offers would have represented an unacceptable deviation from regulatory requirements concerning negotiations. As discussed in greater detail below, however, we are unable to resolve conclusively this factual dispute. Therefore, and since the undisputed record is clear that a reasonable negotiation opportunity was extended to Collins, we must decline Collins' suggestion that we overturn the award to Microwave.

Federal Procurement Regulations (FPR) 1-3.804, "Conduct of Negotiations," requires that "complete agreement of the parties on all basic issues shall be the objective of the contract negotiations," and that "Oral discussions or written communications shall be conducted with offerors to the extent necessary to resolve uncertainties relating to the purchase or the price to be paid." As indicated above, Collins points to its April 24 letter as proof that agreement was reached during negotiations that its various exceptions were acceptable or in the alternative as establishing a duty on the part of the contracting officials to reopen negotiations in order to resolve the "uncertainties" caused by Collins' stated position that its exceptions had been agreed to during negotiations and to achieve the "complete agreement" envisioned by FPR 1-3.804.

However, we cannot conclude on the basis of the record before us that Collins has proven that the agreement which it contends was reached i.e., that all of its technical exceptions were acceptable to FAA, was in fact reached. In this regard, while Collins contends that its April 24 letter indicating agreement serves to prove its contention that such agreement was reached as to the acceptability of the Collins technical exceptions,

we note that letter states in the first paragraph that "the revisions/ comments to the technical and contractual portion of the proposal were agreed to by both parties and represent the contractual baseline for issuance of a contract for the subject Retrofit Kits." (Underscoring supplied.) The fact that "revisions/comments" were considered to be necessary by Collins indicates to us that the items revised or commented on were questioned by the contracting officials during negotiations and therefore were not agreed to as it would seem only logical to leave any portions of the proposal which were acceptable as originally submitted without comment and certainly without "revision." Therefore, our resolution of this protest must be on the basis that the technical exceptions here involved were questioned during negotiations and that as a result of such discussions, Collins submitted the April 24 "revisions/comments" letter. However, the April 24 letter contains no evidence of the agreement of the parties as to the nature and extent of such revisions other than Collins' self-serving statement that the contents of its letter represent the revisions agreed to by the parties. In our opinion, this self-serving statement cannot be considered convincing in view of FAA's contrary assertion and the lack of any documentation in the file before us as to agreements reached during negotiations.

Furthermore, we cannot conclude, in the absence of proof that agreement was, in fact, reached at negotiations as to the acceptability of the Collins exceptions or revisions that there was any duty on the part of the contracting officials to consider further the Collins proposal after receipt of the April 24 letter.

In this regard, the authority to determine when to terminate negotiations on the ground that no significant uncertainties remain for resolution properly is vested in the contracting officials. See B-174327, May 12, 1972, wherein it was held that no obligation to reopen negotiations existed where an offeror merely defended its originally submitted system by attempting to broaden the definition of certain technical requirements and that rejection of the proposal as technically unacceptable at that point without further discussion was not subject to question. See also B-169633(1), January 4, 1972; B-174436, April 19, 1972; B-171591, November 17, 1971.

We do not think it is appropriate for an offeror to force the reopening of negotiations by submitting a proposal revision following negotiations containing the self-serving statement that all aspects of the revision were agreed to during negotiations when that statement is disputed by the contracting officials, particularly where the offeror after the fact and notwithstanding the submission of such revisions contends that its proposal was determined to be technically acceptable during negotiations. Nor do we perceive any obligation on the part of the contracting officer

to ascertain the materiality of exceptions taken in such an after negotiation modification, or whether or not they were in fact agreed to during negotiations, before requesting best and final offers, so long as their materiality is ascertained before award, particularly where, as here, the technical exceptions are somewhat voluminous and are placed in the hands of a nontechnical contracting official literally hours before solicitation of best and final offers. Further, given the FAA position that the Collins technical exceptions were not agreed to during negotiations, the contract negotiator's apparent assumption that the "agreement" referenced in the April 24 letter had reference to the revision by Collins of those technical aspects of its proposal considered by FAA at negotiation to be unacceptable would not appear to be unreasonable. While an offeror certainly has the right in a negotiated procurement to offer deviations from specifications which he feels are appropriate, the Government has a corresponding right to determine whether those deviations in fact meet the Government's minimum needs.

Therefore, once having been informed of unacceptable proposal qualifications during negotiations, which we must assume to have been the case in this instance in view of the factual dispute previously mentioned, it seems to us that an offeror assumes the risk of proposal rejection if he refuses to withdraw or substantially revise the exceptions upon submission of his best and final offer. The fact that best and final offers were requested without advising Collins a second time that its exceptions (amplified but not changed by the April 24 letter) were unacceptable was not prejudicial to Collins in our opinion. Collins, if it was unwilling to withdraw its exceptions, could still submit a reduced best and final offer in the hope that FAA, in the light of Collins' reduced final price offer, would reconsider its determination that the exceptions were substantial and reopen negotiations with competing offerors. This FAA did not do, however, and we cannot conclude that its action in this regard is subject to question.

Accordingly, we conclude that the failure to reopen negotiations with Collins was not improper and that the "error" conceded in the supplemental administrative report with regard to the failure to advise Collins again of its proposal unacceptability was not material. While rejection of Collins' proposal as technically unacceptable before requesting best and final offers might have been preferable to allowing Collins to submit its final offer based on its unacceptable technical qualifications, such notification would not have provided any basis for Collins to request that negotiations be reopened, nor would it have resulted in any change in the ultimate decision to award to Microwave.

The question of the substantial nature of the four Collins exceptions relied on by FAA for proposal rejection (i.e., bandwidth, linearity, envelope delay, and design qualification tests), was submitted to a GAO staff electrical engineer for comment, pursuant to your request. The GAO engineering evaluation concluded, in essence, that the FAA specification requirements for linearity and envelope delay were sufficiently broad and indefinite so as to allow the approaches proposed by Collins in these areas. With respect to the areas of design qualification tests and bandwidth, however, the evaluation concluded that "Collins' proposal, as amended by their April 24, 1972, letter was not responsive to reasonable FAA design qualification tests and bandwidth requirements," and stated that a Collins proposal error in the stated bandwidth parameters of the proposed Collins equipment, not discovered until after award, was "inexcusable." Although the engineering evaluation parenthetically comments that all of the Collins technical qualifications "should have been easily resolved during negotiations," this comment is not germane in view of the factual dispute with respect to the nature of the agreement reached during negotiations discussed above. Thus, the import of the GAO engineering evaluation is that the Collins proposal was technically unacceptable in two of the four areas advanced by FAA.

Further, the well-settled rule of our Office is that the drafting of specifications to meet the Government's minimum needs, as well as the determination of whether items offered meet the specifications, is properly the function of the procuring agency, absent arbitrary action. B-169633(1), supra. We do not think that an honest difference of technical opinion is tantamount to arbitrary action on the part of a procuring agency so that we would be reluctant to substitute our judgment for FAA's in this case even if our engineering evaluation disagreed with the FAA position in all respects.

On the question of the materiality of Collin's insistence on the use of its own guarantee clause, it may well be that the price impact of such a deviation is minimal on a statistical basis, as argued by Collins. Nevertheless, the terms of the Collins guarantee clause are significantly less stringent than those of the FAA clause and we cannot conclude that FAA's insistence on its own clause was unreasonable.

Although we conclude in accordance with the above discussion that the Collins protest must be denied, our review of this case has revealed deviations from good procurement practice which we are calling to FAA's attention by letter of today to the Secretary of Transportation toward the end that such deviations not be repeated in future similar situations. A copy of that letter is enclosed for your information.

Very truly yours,

R.F.KELLER

Deputy Comptroller General
of the United States