DECISION

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

50193 97184

FILE: B-183105 DATE: June 16, 1975

MATTER OF: Kinton Corporation

DIGEST:

1. Department of Air Force interpretation of testing ratio proposed in initial offer--that offeror proposed one test administrator for each tested technician--while eventually determined to be erroneous, is considered rationally founded under facts existing at time of interpretation. Hence, Air Force was not remiss in failing to discuss alleged deficiencies relating to testing ratio of initial offer since proposed ratio was considered appropriate.

2. Concerning allegation that agency should have accepted protesting offeror's testing procedures and methods proposed under 1:2 testing ratio ultimately proposed as satisfactory in themselves, it is noted that merits of offerors' proposals in negotiated procurements are not to be determined by unquestioned acceptance of substance of proposals.

3. Nothing in record rebuts agency's conclusion that methods and procedures attending offeror's proposed use of 1:2 testing ratio, as finally perceived at close of negotiation, were inadequate to meet aims of RFP.

4. Since RFP required only that offeror propose individual who was knowledgeable in test procedures for on-location work, and protesting offeror initially offered knowledgeable individual, we agree that area of proposal was not considered deficient initially so as to be subject of negotiation.

5. Procuring activity was not under obligation to reopen negotiations with protesting offeror and all other competitive-range firms upon discovery of additional deficiencies in protesting offeror's final proposal (ranked initially and finally below proposals of several other competing firms) since meaningful initial discussions, within context of facts and understanding of approaches then existing, were held and reopening would not be in Government's best interest.

6. Complaint that performance testing requirements were improperly changed in November 1974 is untimely filed under Interim Bid Protest Procedures and Standards since it was filed in January 1975 or more than 5 working days after basis of protest was known.

On January 24, 1975, Kinton Corporation (Kinton) filed a protest with our Office. Kinton contended that the Department of the Air Force had improperly awarded a cost-plus-fixed-fee contract (No. F33615-75-C-5103) to Systems Research Laboratories, Inc. (SRL). For the reasons set forth below, we do not agree with Kinton's contention.

The contract was awarded to determine (in the Department's terms) "how accurate * * * troubleshooting aids are when they are properly used in the repair of [radar systems]." This was to be done by testing technicians using the aids in question.

The basis for the impropriety initially alleged concerned the award price of SRL's contract. That price was more than $24,000 higher than the price Kinton had proposed for the contract. Hence, Kinton felt that the Department had improperly overlooked the advantage inherent in its lower-cost offer. (Kinton has recently advised that it is no longer pursuing this argument.)

By letter dated February 5, 1975, Kinton, in response to our January 28, 1975, letter, provided additional details in support of its protest.

Kinton explained that in October 1974 it had submitted an offer for the work in question under solicitation No. F33615-75-R-5103 (under which the contract in question was later awarded). On November 22, 1974, the Air Force allegedly told Kinton that its proposal was considered technically qualified, but that the company should review (and revise) its proposal where appropriate in five separate areas concerning testing and travel cost items.

On November 27, 1974, Kinton submitted its revised proposal which constituted the company's best and final offer. On January 6, 1975, Kinton was told of the award at a higher price to SRL. There

followed a debriefing session at which Kinton was advised of the deficiencies considered to be present in its final offer.

The most crucial of these deficiencies, Kinton was told, involved the concern's failure to provide one individual tester to oversee each technician being tested (Kinton proposed one examiner for two individual technicians) and Kinton's failure to provide a senior staff scientist to be on location at all times during the testing period.

After the debriefing, Kinton alleged, by way of formal protest, that neither the RFP nor the contracting officer gave adequate notice that one test administrator need be present for each tested technician (1:1 testing ratio) at all times or that a senior staff scientist needed to have been on location at all times during the testing period.

Thus, Kinton concluded that the Air Force failed to conduct meaningful negotiations with it about these deficiencies or, in the alternative, that the agency was remiss in failing to amend the solicitation to make its true needs known.

The procuring activity insists that it did not consider Kinton's proposal to be deficient in comparison with the other top-ranked proposals because of the company's failure to propose the 1:1 testing ratio in question. It admits that it thought Kinton had initially proposed a 1:1 ratio, but that it did not realize Kinton had proposed other than a 1:1 ratio until the company's best and final offer was received. At that time it was understood that Kinton had proposed a 1:2 testing ratio. In any event, the Department further asserts that Kinton did not adequately explain how it proposed to achieve the objectives of the RFP with its final testing ratio.

Kinton's reply to the argument that it failed to justify a 1:2 testing ratio is twofold. It maintains that it was prepared to justify a 1:2 testing ratio if requested, and that, in any event, the Department should have realized that its "proposed methods and procedures would do that work satisfactorily."

Whether Kinton initially proposed a 1:2 testing ratio which should have been reasonably apparent to the Department from the beginning of its evaluation of submitted proposals, and whether Kinton adequately justified the methods and procedures attending the observer-observee ratio that it finally proposed, are threshold questions for resolution.

Kinton insists that its proposal, including an attached graph, showed from the start that it proposed a 1:2 ratio. On the other hand, the Department states that the detailed procedure for a scoring scheme shown in Kinton's initial proposal certainly required a 1:1 ratio.

Based on review of the submitted positions, the Air Force's interpretation of the initial manning ratio proposed by Kinton is considered rationally founded.

The preceding consideration leads to our opinion that the Department was not remiss in failing to discuss Kinton's alleged deficiencies relating to the testing ratio part of its initial proposal. Under the view taken, the agency was not aware of possible deficiencies concerning the ratio until receipt of Kinton's best and final offer when the itemized travel costs Kinton proposed simply did not square with a 1:1 ratio.

Kinton further believes the Air Force should have accepted, as satisfactory in themselves, the methods and procedures proposed under its 1:2 manning ratio.

On the contrary, it is axiomatic in negotiated procurement that an offeror must demonstrate affirmatively the merits of its proposal and that such merit is not to be determined by unquestioned acceptance of the substance of its proposal.

Questioning the methods and procedures attending Kinton's proposed use of a 1:2 ratio led the Department to a final conclusion that the work aims of the RFP could not be met under Kinton's proposal. Nothing in the present record rebuts the Department's final conclusion.

Nor can we conclude that the agency improperly failed to convey, either by RFP amendment or by initial negotiation, the requirement for an individual, knowledgeable in test procedures, to be present on location at all times during the testing period. We agree with the Department's view that all that was initially or finally required by it was an individual, whether titled "senior staff scientist" or otherwise, who fully understood the procedures involved. Since Kinton initially proposed a knowledgeable individual, this area of its proposal was not considered deficient initially or considered an area of Kinton's proposal requiring discussion.

There remains for consideration whether the Air Force was obliged to have reopened negotiations with Kinton when, after analysis of the company's best and final offer, it was decided that Kinton's manning ratio and attendant procedures did not offer assurance that the RFP's testing requirements could be satisfactorily achieved and that Kinton had not proposed a knowledgeable individual for location work.

These deficiencies, it is clear, were considered critical to the further downgrading of its proposal. (Kinton's proposal, which was initially rated below those proposals submitted by several other concerns, dropped by one relative ranking in the final ratings.)

Once negotiations have been held and best and final offers received, negotiations should not be reopened unless it is clearly in the best interests of the Government to do so. ILC Dover, B-182104, November 29, 1974, and cases cited in text. This principle presumes, of course, that meaningful discussions have been held initially with competitive-range offerors.

The procuring activity insists that meaningful discussions were held with Kinton although these discussions did not involve the deficiencies later determined after receipt of the company's best and final proposal. The Department takes this position because it simply did not consider Kinton's proposal to be deficient in the areas in question at the time discussions were held.

The acceptance of the Department's position, which we consider rationally supported, leads to the conclusion that the agency was

not under obligation to reopen negotiations with Kinton and all other offerors unless the Government's interests would be so served.

Nothing in the record before us, including the merit contained in Kinton's initial or final proposals (both of which were ranked below the proposals of several other offerors), supports a view that the Department's best interests would have been served by reopening negotiations after receipt of best and final proposals, assuming that the applicable procurement regulations would have otherwise permitted reopening.

This case is therefore distinguishable from the circumstances in Dorsett Electronics Division, LaBarge, Inc., B-178989, March 6, 1974, cited by Kinton, when we criticized an agency's failure to point out specific known defects during the conduct of initial negotiations. As we stated in the cited case:

> "While the questions deal with general areas of the Dorsett proposal, the ECOM evaluation team had specific deficiencies of the proposal in mind when the group of questions [initial negotiations] was presented to Dorsett."

Kinton also alleges that in November 1974 performance testing requirements of the RFP were changed without formal RFP modification. This complaint is untimely filed under our Interim Bid Protest Procedures and Standards (4 C.F.R. § 20.2(a) (1974)), since it was received at GAO in January 1975 or more than 5 working days after the basis for protest was known in November 1974.

Protest denied.

Deputy Comptroller General
of the United States