DECISION

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

60004

FILE: B-183872 DATE: October 1, 1975

97860

MATTER OF: Libby Welding Company, Inc.;
Wolverine Diesel Power Co.

DIGEST:

1. Question whether negotiations should be reopened, even though previously terminated properly by call for "best and final" offers, is not for decision within context of "Late Proposals" provisions of ASPR § 3-506 (1974 ed.), since offeror's "request" that negotiations be reopened because of supplier's price change is not considered formal "proposal" and alleged price change is theoretically available to all offerors rather than only to offeror making request.

2. Exception may be taken to decision not to reopen negotiations only if Government's best interest was arbitrarily disregarded by decision. Given uncertainties in projecting possible monetary savings attending reopening negotiations, it cannot be concluded that best interest was arbitrarily disregarded.

3. Any unequal pricing competition which may have resulted because of supplier's price change was risk offerors assumed in competitive procurements and was not caused by RFP which was strictly drawn to insure equal competition.

4. Allegations that offer submitted was result of collusion is not for consideration by GAO, since interpretation and enforcement of criminal laws of United States are functions of Attorney General and Federal courts.

5. Department's refusal to grant protesting offeror's suggestion regarding use of termination inventory under another contract constituted adverse agency action. Since protest regarding denial of suggestion was filed more than 10 working days after company was notified of adverse action, ground of protest was untimely filed under Bid Protest Procedures (40 Fed. Reg. 17979 (1975)) and will not be considered.

On December 6, 1974, the Department of the Air Force issued request for proposals (RFP) F04606-75-R-0669 to purchase a quantity of A/M32A-60A generator sets under a fixed-price contract. The RFP

specified the General Electric (GE) Company as the sole-source vendor for "source specified generator/regulator components." After proposals were opened under the RFP, the Department determined that "* * * GE had increased its prices for these components significantly." Consequently, the Department revised the specifications, "in the interest of providing effective subcontract competition," to permit use of either the GE component or a Bendix Corporation generator/regulator. (This change was communicated to offerors by TWX dated February 7, 1975. The TWX, later confirmed by amendment No. 0004, established a revised proposal opening date of March 3, 1975, for the procurement.)

After proposals were opened on March 3, 1975, negotiations were conducted with all offerors in the competitive range. The Department then requested offerors to submit "best and final" offers by March 13, 1975. All offerors, except John R. Hollingsworth Co. (Hollingsworth), reduced their prices in response to the call for "best and final" offers. Hollingsworth left its price unchanged. Neither the RFP document, as amended by amendment No. 0004, nor the request for best and final offers required offerors to identify the GE or Bendix component intended for use.

Hollingsworth submitted the lowest price ($10,304,840) for the contract. Offers were also received from Libby Welding Company, Inc. (Libby), and Wolverine Diesel Power Co. (Wolverine). After making an extensive preaward survey on Hollingsworth's capabilities to furnish the required items, the contracting officer concluded that Hollingsworth could do the work and thus be considered a responsible prospective contractor. The time involved in determining Hollingsworth's responsibility was such, however, that all offerors, including Hollingsworth, were asked to extend the time set for acceptance of their offers. Offerors favorably responded to the requested extension.

On May 12, 1975, a protest was received from Libby. Libby asserted that since the date (May 1, 1975) on which it was requested to extend its offer GE had "* * * lowered its price [on the components involved] by an excess of $1,000,000 on the procurement." Because of this reduction Libby requested the Department to reopen negotiations "* * * in view of the significant change in the competitive situation on the established sole source component." And, since the Department had not responded to its request as of the middle of May 1975, Libby felt that it should protect its interest by filing a protest with our Office.

Shortly after Libby filed its protest, Wolverine lodged a separate protest with our Office under the RFP. Wolverine stated that "* * * one of the approved electrical subcontractors has admitted to a verbal agreement for a substantial price reduction to the apparent low offeror,

if * * * [the offeror] received the award." Since the electrical subcontractor in question had not made the price reduction offer to Wolverine, Wolverine questioned the "ethics and legality" of the offer to only one offeror and asked for a "thorough investigation of this apparent collusive action."

AIR FORCE REPLY

The Department insists that Libby's request for a reopening of negotiations should be denied. This position is essentially based on the argument that any price savings for the Government resulting from reopened negotiations is speculative only.

Price savings is considered speculative because Hollingsworth's low offer (allegedly based on use of Bendix components) would remain low even if all the other offers were reduced by the amount of the price reduction allegedly now offered by GE. Further, the price reduction should not be confidently fixed at so large a figure as $1 million since GE has offered a price reduction not for the generator/regulator component alone but rather for a "larger component package." Therefore, the price comparison is made difficult.

Were it established that the Government could realize savings by reopening negotiations, the Department further argues, the savings in itself, would not justify reopening. To support this point, the Department cites 43 Comp. Gen. 217 (1963), involving a formally advertised procurement, where we concluded that all bids need not be discarded, even though certain bid evaluation procedures were not clearly described, absent an administrative determination of unreasonable bid prices. We assume this precedent is cited to give support to the Department's position that reopening need not take place in the subject procurement when Hollingsworth's offered price is considered reasonable.

ANALYSIS

Counsel for Libby has cited more appropriate precedent, involving a negotiated procurement, for beginning our consideration of the "reopening" issue here. Counsel acknowledges that we have held that prospective monetary savings alone is not sufficient to justify reopening negotiations to permit consideration of a late proposal or modification. See 52 Comp. Gen. 169, 171-172 (1972). Our Office took this view even though the then-existing "Late Proposals" provisions of the Armed Services Procurement Regulation (ASPR) expressly provided that

the Secretary concerned could authorize consideration of a late proposal where he determined that consideration would be of "extreme importance to the Government." See ASPR § 3-506(c)(ii) (1969 ed.) (By contrast, the current "Late Proposals" provisions in ASPR make no mention of allowing the Secretary concerned to authorize consideration of late proposals. See ASPR § 3-506 (1974 ed.).)

As we explained in the cited case:

> "As to whether negotiations should have been reopened after receipt of your late modification of June 9, the above-cited regulation (ASPR 3-506(c)(ii)) does not state that the contracting officer must refer all late proposals and modifications (ASPR 3-506(c)(g)) to the Secretary, and the example shown therein of 'extreme importance to the Government' is an important technical or scientific breakthrough. While our decision, 47 Comp. Gen. 279 (1967), which you cite, expresses the view (at pages 283 and 284) that the provisions of ASPR 3-506 were not intended to preclude the opening of negotiations upon receipt of a late modification which indicated such negotiations would be advantageous (pricewise) to the Government, our analysis of portions of the history leading up to the promulgation of the regulation (as since furnished this Office by the Department of the Navy) requires the conclusion that an indicated monetary savings, alone, was not considered sufficient to bring a late proposal or modification within the category of 'extreme importance to the Government.' * * *"

Counsel for Libby further suggests, however, that reopening negotiations, as requested here, would not be contrary to the cited precedent because the reopening would not be for Libby's sole benefit but for the Government's benefit. We assume this statement means that the alleged savings resulting from GE's price reduction would be available to all offerors. Since the reduction would be available to all offerors, Libby's suggestion that negotiations be reopened, in counsel's view, should not be considered a late proposal or modification.

We are inclined to accept counsel's view that the circumstances here are such that reopening negotiations would not strictly conflict with the cited precedent. It is clear that Libby's request is not a formal proposal or modification so as to be strictly subject to the "Late Proposals" provisions as was true in the cited case. Libby's request did not contain a revised price, delivery schedules or other terms normally present in a formal proposal or modification. Further,

the alleged price reduction concerning the major component is theoretically available to any prospective offeror unlike the price reduction in the cited case which only involved the offeror in question.

Since the question whether negotiations should be reopened here, even though they had previously been properly terminated, is not for decision within the context of the "Late Proposals" provisions of the procurement regulations, we may take exception to the Department's decision not to reopen negotiations only if the Government's best interest was arbitrarily disregarded by this decision. See B-176283(3), February 5, 1973, where we said:

> "* * * 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. * * * [A] reopening of negotiations in the absence of a valid reason tends to undermine the integrity of the competitive negotiations process. If the instant case be typical, contracting officers may not be aware of the need to avoid excessive rounds of negotiations. * * *"

We can conceive of situations where the probability of general monetary savings resulting from external changes influencing all offerors would undoubtedly constitute sufficient reason to permit the Government to reopen negotiations. An obvious example of this change would be a substantial increase or decrease in the Government's requirements. Another example would be a significant confirmed price change in the price of a supplier's component required to be priced by all offerors which would undoubtedly result in monetary savings to the Government if negotiations were pursued.

As we see it, the primary reason the Department has opposed reopening negotiations is its view that the claimed savings which would attend reopening negotiations here is speculative only. This is so because there are separate component packages offered by the two different suppliers (only one of whom has allegedly offered a price reduction), thus making it difficult to project proposed cost savings attending the reopening of negotiations. Libby's counsel admitted this fact in the July 17, 1975, letter when he stated:

> "* * * As the contracting agency has stated, and as has been shown above, it is difficult to compare the Bendix and GE * * * [supplier quotes] precisely. * * *"

Given the uncertainties in projecting possible cost savings to the Government attending reopening of negotiations, we cannot conclude that the Department arbitrarily neglected the Government's best interest in refusing to reopen negotiations. Neither do we agree with Libby's suggestion that reopening negotiations is needed to insure equal competition, since the RFP, in our view, was strictly drawn to insure equal competition. Any unequal pricing competition that may have developed here because of the pricing policies of potential suppliers is a risk offerors assume in competitive procurements. It is not a risk which the Government is obliged to eliminate at the cost of having multiple reopenings of negotiations.

Wolverine has alleged that Hollingsworth's final offer was made as a result of "apparent collusive action." While Libby states that there is "no direct proof of collusion," it urges that due note should be taken of the low price proposed by Hollingsworth.

ASPR § 1-111.2 (1974 ed.), "Noncompetitive Practices, provides that evidence of violation of the antitrust laws (for example, collusive bidding) in negotiated procurements should be referred to the Attorney General by the procuring agency involved. It is the implicit position of the Department that referral to the Attorney General of the alleged facts of collusion here is not warranted because the "* * * evidence of collusion in this case is utterly lacking while evidence against collusion is visibly present in the form of an affirmative denial by Hollingsworth." The Department takes this view because neither Wolverine nor Libby alleges any specific facts concerning collusive practices prior to the date set for receipt of best and final offers.

The interpretation and enforcement of the criminal laws of the United States are functions of the Attorney General and the Federal courts, and it is not within our jurisdiction to determine what does or does not constitute a violation of a criminal statute. (We note, however, that Libby and Wolverine may directly request the Department of Justice to consider the case if the companies believe criminal law violations are involved.)

By letter dated July 17, 1975, received more than 2 months after the protest was filed, Libby raised the last ground of its protest. This ground of protest related to the Department's refusal in April 1975 to accept Libby's suggestion that all offerors under the RFP be given the opportunity to evaluate certain termination inventory obtained by the Department under another contract and be allowed to make an offer here based on acquisition of the inventory.

The Department's refusal to grant Libby's suggestion regarding termination inventory constituted adverse agency action in the matter. Since Libby's protest regarding the denial of its suggestion was filed more than 10 working days after the company was notified of the adverse action, this ground of complaint was untimely filed under our Bid Protest Procedures (40 Fed. Reg. 17979 (1975)). Thus, we will not consider this ground of complaint.

Protests denied.

Deputy Comptroller General
of the United States