

DECISION



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

FILE: B-184098

DATE: March 2, 1976

MATTER OF: Engineered Systems, Inc.

60540

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DIGEST:

1. GAO Bid Protest Procedures are intended to require protesters to raise issues in timely manner. Where contracting agency first raises certain issue in report to GAO on protest, no reason is seen why issue should not be for consideration on merits, notwithstanding party's allegation that it is untimely.
2. Where RFP specifies directed source subcontractors, Government takes responsibility for performance difficulties occasioned by subcontractors' performance. Offeror whose proposal discloses potential difficulties with conditions imposed in subcontractor proposal is placed in disadvantageous competitive position where second offeror's proposal--which does not disclose any subcontractor conditions--is considered acceptable by Government. Notwithstanding issue raised concerning late modification to first offeror's proposal which removed subcontractor condition, recommendation for corrective action in procurement is inappropriate in any event. Instead, Government should review need for directed source subcontractors and insure equality of competition among offerors in future procurements.
3. Allegations of unfairness by agency in conduct of discussions with offerors are without merit where (1) impropriety on part of successful offeror in obtaining revised quotation from directed source subcontractor is not shown; and (2) no evidence is presented to show that protester's proposal data was improperly disclosed. Contracting officer states additional cost data was sought from protester to determine whether mistake in its proposal existed, not for release to other parties; and fact that successful offeror reduced price in best and final offer does not prove that protester's price was leaked.
4. Concept of "responsiveness" is not directly applicable to negotiated procurement, and fact that initial proposal contains unacceptable condition does not mean rejection of proposal for this reason would be justified.

Engineered Systems, Inc., has protested against the award of a contract to E-Systems, Inc., by the Department of the Air Force under request for proposals (RFP) No. F34601-75-R-3034. The major issue in this case involves the RFP requirement that the contractor use directed source subcontractors. The protester contends that the Air Force improperly conducted discussions with E-Systems after the receipt of best and final offers, thereby allowing E-Systems to remove an unacceptable condition in its proposal which had been imposed by one of the directed source subcontractors.

The condition had been established in a proposal to E-Systems from Ling Temco Vought-Vought Systems Division (LTV/VSD). E-Systems' initial proposal submitted to the Air Force included the following statement in this regard:

- "2. The subcontractors set forth in the solicitation have responded in varying degrees to the specific terms of the request for proposal. In view of the relative inflexibility of the Prime Contractor's discretion and sole source leverage related to these subcontractors, the subcontractor responses have been included herewith without alteration to their terms and conditions. Where these conditions vary from the terms of the solicitation, it is our intention to subcontract as proposed where compromise cannot be attained and a condition of our response is that these conditions become a part of the prime contract. This position is taken primarily in relation to the method of handling overtime, but also more generally as specified in each subcontractor response. Copies of the subcontractors' proposals are attached for your review and verification.

[LTV/VSD] has stated that no in-plant support will be provided under their response and that a condition of their price is the award of a 'separate contract by the Air Force (Aeronautical Systems Division) which provides for (1) additional Engineering field support during the initial deployment cycles of the Swift System (2) in-house Engineering and Technical Support for the Swift System during the period covered by the subject RFP and the option period.' Since we have no control over this condition, it is herewith specifically passed on as a condition of our proposal. [Emphasis added.]"

The condition was unacceptable to the Air Force, and questions were raised in the discussions with E-Systems concerning this and other points. Pertinent questions, and E-Systems' answers thereto, as set forth in its best and final offer, follow:

"Question 15: 'If E-Systems does not plan to negotiate until after award of a contract how do you propose to make the compromise reached with subcontractors a part of the prime contract? * * *

"Answer: Contracts are contemplated, however, the lack of leverage provides little room for compromise.

"Question 18: The proposed contract must stand alone and not be based upon what ASD may or may not do. Unable to accept LTV's stipulation on award of a contract by ASD.

"Answer: See question 15 above. E-Systems, Inc., no authority or control over contracts that may be awarded by ASD.

"Question 24: Discuss Paragraph (3) Page IV-7 of Price. ITT's proposal. Too many exceptions and stipulations.

"Answer: The item will be exercised with ITT. LTV/VSD, as was ITT, are directed procurements. (Our best and final price accepts responsibility for the subcontractors.)

"Question 25: ITT has overstated their direct man hours. Didn't allow but 10 days vacation and no holidays, or sick leave. Max Number Priced should be 1858 per man year.

"Answer: This item will be exercised with ITT. LTV/VSD, as was ITT, are directed procurements. (Our best and final price accepts responsibility for the subcontractors.)

"Question 26: LTV/VSD did not propose vacation, SL [sick leave] or holidays. Due to many reservations, question validity of their proposal.

"Answer: LTV/VSD, as was ITT, are directed procurements. (Our best and final price accepts responsibility for the subcontractor.) [Emphasis added.]'"

After the closing date for receipt of best and final offers, the Air Force contacted E-Systems on May 29, 1975, concerning several points in its best and final offer. On May 30, 1975, E-Systems sent a message in response which stated in part:

"* * * THE FOLLOWING CLARIFICATIONS AND UNDERSTANDINGS ARE CONFIRMED * * *

* * * * *

"5. THE STATEMENT CONTAINED IN PARAGRAPH 2 OF THE * * * [INITIAL PROPOSAL] IS HEREWITH RESCINDED. [E-SYSTEMS] WILL COMPLY WITH THE TERMS OF THE CONTRACT AS CONTAINED IN THE CONTRACT SCHEDULE NOTWITHSTANDING CONDITIONS WHICH MAY BE CONTAINED IN SUBCONTRACT AGREEMENTS."

The protester contends these circumstances show that E-Systems' best and final offer contained an unacceptable condition imposed by LTV/VSD and that it should have been rejected. This being the case, it is contended that the May 29-30 communications constituted improper discussions and a late modification to the proposal. The Air Force position is essentially that E-Systems' best and final offer removed the unacceptable condition, and that the May 29-30 communications were merely a clarification of matters already agreed to. E-Systems argues in support of the Air Force position and offers in evidence a copy of a telegram to it from LTV/VSD, dated May 15, 1975 (prior to the closing date for best and final offers) in which LTV/VSD explicitly deleted the objectionable condition.

Also, E-Systems has raised a threshold question as to whether this issue was presented to our Office in a timely manner. In this regard, the timeliness provisions of our Bid Protest Procedures (40 Fed. Reg. 17979 (1975)) are directed at requiring protesters to raise protest issues in a timely manner. In the present case, the discussions issue was raised initially by the Air Force in its report to our Office. The agency apparently considered this issue of sufficient importance that it should be addressed in the report even though the protester had not raised it. Under these circumstances, we see no reason why this issue should not be for consideration on the merits.

We find it unnecessary to decide which interpretation of the E-Systems best and final offer is more reasonable, or whether the offer was ambiguous. Even if our decision on the merits upheld the protest, we believe that a recommendation for corrective action would be inappropriate in this case. In part, this is due to the advanced stage of

contract performance. A more important consideration, however, is what we view as problems with the RFP itself and the procurement process in this case which need to be reviewed by the Air Force prior to any resolicitation of these services.

In this regard, as noted supra, the RFP specified certain directed source subcontractors. We note that E-Systems included with its proposals the subcontractor proposals which it had received and disclosed to the Air Force the difficulties it was experiencing with them. In contrast, Engineered Systems did not submit the subcontractor proposals it had received, but merely submitted its own proposals which took no exception to the RFP requirements. The Air Force apparently considered both E-Systems' and Engineered Systems' proposals to be acceptable. So far as the record shows, both E-Systems and Engineered Systems received the same proposals from the subcontractors, with the exception of a revised price quotation submitted by LTV/VSD to E-Systems, discussed infra.

Where the contracting agency lists specific subcontractors in the solicitation which the prime contractor must use, it would appear that the Government is taking on a responsibility for difficulties during performance of the prime contract which are occasioned by subcontractor performance problems. See, in this regard, Franklin E. Penny Co. v. United States (Ct. Cl. No. 433-73, October 22, 1975) where the court stated:

"The contention is made that since Government approval of the bonding manufacturer was not only a contract requirement but also an unavoidable prerequisite in this case (because of the unavailability of all previously approved manufacturers), then the termination of the contract before the contractor was in a position to submit work for approval was plainly a breach of contract.

"This contention cannot be accepted. The argument completely overlooks the fact that the contract termination, though indeed effected before approval had been accomplished, occurred after plaintiff had failed to meet the delivery date that had been promised. To ignore this critical fact is, in essence, to say that the Government's contract reservation of a right of approval carries with it the correlative duty to hold open a contract without regard to all intervening delays until such time as the

contractor is in a position to tender a product for approval. Clearly, there is no such obligation. On the contrary, contractor-caused delays in timely submitting a product for approval expose the situation to the same risks of termination as would attend the failure to make timely deliveries once approval had been given. In either case, the sufficiency of the contractor's performance is to be measured by the dates specified in the contract; where delinquencies occur which are not excusable, than termination for default is within the Government's rights.

"To be sure, the rule would be otherwise if the delays resulted from circumstances with respect to which the Government bore the risk. Thus, for example, if it had been the case here that the Government had selected the subcontractor or had vouched for the competence of the one that was selected, then delays attributable to that subcontractor's technical problems (in doing the work) would remain within the Government's sphere of responsibility. * * *" (Emphasis added.)

In this light, it appears that a procurement situation such as the one here works to the disadvantage of an offeror which responds candidly and in detail to the RFP by including subcontractor proposals which contain conditions unacceptable to the agency. That is, an offeror which notes the unacceptable subcontractor provisions may be placed in the position of either having to take responsibility for the subcontractors, or else have its proposal considered unacceptable by the contracting agency. On the other hand, an offeror which merely offers to perform the work without exception is in a more favorable position if the agency is willing to consider its proposals acceptable on this basis. Moreover, should difficulties arise during contract performance because of subcontractor problems, such an offeror again would be in an advantageous position since the Government may be held accountable for having directed it to use specified subcontractors.

We believe these considerations illustrate certain difficulties in this type of procurement which need to be reviewed by the Air Force prior to the next solicitation of these services. We are calling these matters to the attention of the Secretary of the Air Force by letter of today and suggesting that (1) the need for directed source subcontractors be reviewed prior to the next procurement, and (2) if directed source subcontractors are stipulated, the conduct of the procurement be undertaken in such manner as to insure that all offerors are competing on an equal basis.

The remaining issues raised by the protester are as follows. Engineered Systems contends that, contrary to a statement in the Air Force report, E-Systems did in fact obtain a revised quotation from LTV/VSD prior to submitting its best and final offer. The protester also contends that E-Systems' obtaining of a revised quotation from LTV/VSD indicates that the Engineered Systems price was leaked and suggests that E-Systems may have discovered during the discussions that its price was not low because of the initial quotation it had obtained from LTV/VSD. Engineered Systems further contends that examination of the E-Systems best and final offer will reveal that the price decrease therein stemmed directly from the revised LTV/VSD quotation. In connection with the alleged price leak, Engineered Systems further contends that the contracting officer advised it to the effect that he would allow the other offerors to examine detailed cost data which was to be submitted by the protester, in order that they could revise their proposals in light of this information.

We are, first of all, unaware of any provision in applicable procurement law or regulations which precluded E-Systems from obtaining a revised quotation from LTV/VSD, and the protester has called none to our attention. Concerning the alleged price leak, the contracting officer denies that he made the statement attributed to him by the protester. According to the Air Force report, the cost data was solicited from Engineered Systems because the contracting officer suspected a mistake in its proposal. Also, in cases where, as here, evidence to support an alleged price leak is lacking, our Office has seen no basis to conclude that prejudice to the protester occurred. 53 Comp. Gen. 5 (1973). Further, we have observed that the fact that a lower price is submitted in a best and final offer does not demonstrate the existence of a price leak, because it is not uncommon for offerors to reserve their lowest-priced proposals until the final round of negotiations. Davidson Optronics, Inc., B-179925, February 22, 1974, 74-1 CPD 93.

Engineered Systems also has contended that E-Systems' initial proposal should have been found "nonresponsive" due to the condition established by LTV/VSD. We see no merit in this contention. We have often observed that the concept of responsiveness--the conformity of an offer in all material respects with the terms of the solicitation--is not directly applicable to negotiated procurement. See, for example, Teledyne Ryan Aeronautical, B-180448, April 29, 1974, 74-1 CPD 219. Further, ASPR § 3-805.2 (1974 ed.) provides that doubts as to whether an initial proposal is within the competitive range should be resolved by including it. Under the circumstances, we see no basis to conclude

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that the Air Force should have rejected the E-Systems initial proposal because of the LTV/VSD condition.

In view of the foregoing, the protest is denied.


Deputy Comptroller General
of the United States