Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Motorola Inc.

File: B-236294

Date: November 21, 1989

DIGEST

1. Protest that awardee's offer is unrealistically low does not provide a basis for the agency to reject a technically acceptable proposal offering fixed and ceiling type prices, absent a finding of nonresponsibility.

2. Where a proposal is considered acceptable and in the competitive range, the agency is under no obligation to discuss price where the agency does not view the offeror's price as unreasonably high.

3. Agency is not required to reopen discussions after receipt of best and final offers to determine the acceptability of a deficient alternate proposal first submitted at that time.

DECISION

Motorola Inc. protests the award of a contract to M/A-COM Government Systems, Inc., under request for proposals (RFP) No. N00039-88-R-0242(Q), issued by the Space and Naval Warfare Systems Command, Department of the Navy. The protester principally contends that the agency failed to consider the risks of contracting with M/A-COM on the basis of its far lower cost, which the protester believes to be unreasonable and unrealistic unless the agency waived material solicitation requirements.

We deny the protest.

On June 21, 1988, the agency issued the solicitation for phase I full-scale engineering development, including design, fabrication and testing of AN/USC-42(V) communications equipment to support satellite communication nets. The solicitation also contained three 1-year options for phase II follow-on production, which were included in

the technical and price evaluation, as well as other support items including training, test equipment and repair parts.

The solicitation's statement of work required the successful contractor to qualify a second source producer for the communication equipment, and a portion of the deliverable line items were set aside for the second source producer. The instructions for proposal preparation advised offerors that their proposals should describe their agreements with their proposed second source producers.

The solicitation provided for award to that responsible offeror whose proposal was determined to be most advantageous to the government, price and other factors considered. The RFP contained numerous technical and management evaluation criteria. The RFP stated that evaluation would be based upon an "integrated assessment" of price, technical, and management requirements for the phase I development effort and the phase II production options. The RFP also stated that evaluation would be based upon "the degree to which" the offeror demonstrated an ability to meet the government's requirements and the "probability of meeting" such requirements. The solicitation provided further that for the production portion of the effort, price was more important than technical factors, but that technical factors would be more important than price for the development effort. Both price and technical considerations were more important than management.

With respect to cost, the RFP essentially contemplated a fixed-price incentive fee type contract with ceiling prices (a portion of the contract was to be cost-reimbursable). The RFP advised offerors that the agency would use the ceiling prices of fixed-price incentive items (for the development phase) and not-to-exceed items (for the production phase) in evaluating price. The RFP stated that offerors should explain the methodology used to establish elements of cost in sufficient detail to demonstrate "cost reasonableness and reliability."

The agency received two responses on the date for receipt of initial proposals. The two proposals were essentially equal in price, but with regard to the technical proposals, the agency technical evaluation board found the protester's proposal to be decidedly superior. The board found the protester's proposal, which was based on its previous efforts to produce a developmental model of the same communication set, to be technically acceptable, assigning a rating of "good," as opposed to a rating of "poor" for the awardee. The board noted, among other deficiencies, that

the awardee's design, which was based on a merger of technology developed for two Air Force programs, depended heavily on hardware that had neither been tested nor verified; the board nevertheless concluded that the awardee's proposal was susceptible of being made acceptable.

The agency held discussions with both offerors and invited both to submit revised proposals. The technical evaluation board reviewed additional material submitted by both offerors and, on March 21, completed its re-scoring of the proposals. The board found the protester's understanding of the solicitation requirements to be excellent and its design approach to be "risk-free." Although the board rated the protester's technical proposal appreciably higher than that of the awardee, the board found that with the additional information provided by M/A-COM, both offerors were technically acceptable and capable of performing the contract.

In May, the agency conducted additional oral discussions to insure that neither offeror took exception to solicitation requirements and requested best and final offers (BAFOs). The agency also modified the solicitation somewhat, to eliminate certain optional requirements from the price evaluation and to extend the schedule for both the development and the production phase.

In their BAFOs, both offerors lowered their prices, but M/A-COM reduced its price by nearly three times as much as did the protester, so that after combined consideration of all evaluation factors (both technical and price were scored to arrive at a total score for each offeror), the agency contract award review panel recommended award to M/A-COM, the firm receiving the highest score. On June 26, the agency source selection official determined that despite the technical superiority of the protester's proposal, the awardee's much lower price offered a significant advantage to the government, in view of the technical evaluation board's belief that the awardee was capable of performing in accordance with requirements. Consequently, the agency awarded a contract to M/A-COM on July 15. On July 24, Motorola filed this protest with our Office.

Motorola contends that the awardee's price is unrealistically low, that either the agency must have relaxed the specifications for the awardee, putting the two offerors on an unequal footing, or that the agency failed to consider the risks involved in accepting the awardee's low price. Specifically, Motorola argues that M/A-COM's proposed design used a direct conversion to base-band receiver that "raises the distinct possibility" that the

communication set would not meet the solicitation requirements for blanking of interference of radar pulses. Otherwise, the protester asserts, the agency has failed to consider whether the awardee's price is reasonable or realistic.

Initially, we note that the contracting agency is responsible for evaluating the information supplied by an offeror and ascertaining whether it is sufficient to establish the technical acceptability of its offer, since the contracting agency must bear the burden of any difficulties incurred by reason of a defective evaluation. Harris Corp., B-235126, Aug. 8, 1989, 89-2 CPD ¶ 113.

Here, as the agency points out, the contract awarded to M/A-COM is identical to the terms of the solicitation and contains no indication of an intent to waive material requirements on behalf of the awardee. The awardee took no exception to the solicitation requirements but specifically represented that its design met the pulse interference requirements of the specifications. The awardee provided the details of that design, which were reviewed by the technical evaluation board. The technical evaluation board considered and accepted M/A-COM's direct conversion technique in achieving the specified radar pulse interference level. While the protester has raised the "possibility" that this technique may not in fact work, offerors under the terms of the RFP had to demonstrate only the "probability of meeting" agency requirements. There is nothing in the record to show that the agency unreasonably determined that M/A-COM had so demonstrated.

As noted above, the board expressed concern over the awardee's heavy dependence upon the use of unproven and untested hardware and this concern was reflected in the low rating given to the awardee's technical proposal. Nevertheless, the board also considered evidence of the awardee's extensive experience with the program and similar efforts for the Air Force and expressed its confidence that the awardee would be able to make a valid technology transfer from those programs. Despite the protester's assertion that the hardware proposed by the awardee presents an unacceptable risk, we find that the agency considered these risks and believed them to be acceptable. We find nothing in the record from which we can conclude that this determination is either arbitrary or unreasonable.

Concerning the awardee's low price, we note that an agency may generally award to a lower priced, lower technically-scored offeror if it determines that the cost premium involved in awarding to a higher rated, higher priced

offeror is not justified given the acceptable level of technical competence at the lower cost. See Dayton T. Brown, B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321. From our examination of the record as a whole, we find that the agency's evaluation of technical and price factors was reasonable and consistent with the stated evaluation criteria.

We note initially that the agency followed the price evaluation scheme provided for in the solicitation. While the solicitation employed several different pricing schemes for the individual line items, the principal items were either fixed price incentive during the development effort or at a ceiling not-to-exceed price subject to downward revision during the production phase. The agency therefore considered the maximum price that could be charged for each line item in computing the offeror's total prices; the contract is not therefore subject to upward adjustment based upon the awardee's actual cost experience, but places full responsibility for costs above the fixed cost squarely upon the awardee.

In a case such as this, where the contractor bears the risk should its technical approach result in a higher cost than anticipated, we have held that the agency cannot withhold award merely because the low offer is allegedly unreasonably low. See Litton Sys., Inc., Electron Tube Div., 63 Comp. Gen. 586 (1984), 84-1 CPD ¶ 485. As a general rule, the question of whether a contract can be satisfactorily performed at the price offered is a matter of the offeror's responsibility, and the submission of a below-cost offer is not in itself legally objectionable. Whether the prospective contractor can meet contract requirements in light of its low offer is a matter to be considered by the contracting officer in assessing responsibility, affirmative determinations of which our Office will not generally review. Paige's Sec. Servs., Inc., B-235254, Aug. 9, 1989, 89-2 CPD ¶ 118.

As noted above, the agency found that the awardee's proposal presented an acceptable risk and met the essential requirements of the solicitation at a lower cost. Apart from field engineering support, which amounted to less than 3 percent of contract cost, the evaluation scheme did not provide for consideration of cost realism. In short, despite the protester's technical superiority, the record shows that the agency knowingly assumed the risk of contracting with a lower priced offeror whose technical proposal was inferior to the protester's proposal. Such determinations are within the contracting agency's discretion. Accordingly, we deny this protest ground.

The protester also contends that in the course of discussions, the agency should have advised Motorola that its price was unreasonable, in view of the much lower cost offered by M/A-COM. The protester argues that if the agency had developed a government estimate that supported a belief that Motorola's price was too high, it was obligated to so advise the protester.

The content and extent of discussions in a given case are matters of judgment primarily for determination by the agency involved and are not subject to question by our Office unless they lack a reasonable basis. Bauer of America Corp. & Raymond Int'l Builders, Inc., A Joint Venture, B-219343.3, Oct. 4, 1985, 85-2 CPD ¶ 380. The record before us contains no indication that the agency considered the protester's price to be unreasonable; rather, it appears that prior to the awardee's dramatic price reduction during BAFOs, the proposals submitted by M/A-COM and the protester were essentially equal from a price standpoint, and both were considered reasonably priced by the agency despite the presence of a lower government estimate. Where, as here, the protester's proposal is considered acceptable and in the competitive range, the agency is under no obligation to discuss an offeror's price when the agency does not view the offeror's price as unreasonably high. See generally Training and Management Resources, Inc., B-234710, June 29, 1989, 89-2 CPD ¶ 12. Under the circumstances here, we do not believe that the agency was obligated to advise the protester that its price was too high.

The protester also argues that the agency should have found the awardee's proposal technically unacceptable because its proposal failed to indicate that its second sourcing arrangements were firm. The protester identifies no contractual provision that requires offerors to comply with the second sourcing requirements in any particular form, nor has our review of the solicitation disclosed any such provision. We note that as with the technical requirements for communication set hardware, the technical evaluation board generally found the awardee's discussion of its second sourcing arrangement to be weak, in that its arrangements were tentative and its proposal generally would not give its proposed second source the opportunity to develop experience in all phases of production. Nevertheless, we find that as with the technical requirements, discussed above, the board considered the weaknesses in the awardee's second sourcing arrangements in scoring M/A-COM's technical proposal. We find that its treatment of the awardee's arrangements was

consistent with the solicitation provisions and evaluation scheme.

The protester has raised an additional issue, in response to the agency report, concerning the agency's rejection of an alternate proposal submitted by Motorola in response to the request for BAFOs and containing a modified economic price adjustment clause previously rejected by the agency. The protester asserts that the lower cost of its alternate proposal, combined with its high technical score, would have given its proposal overall a higher point total than the proposal from M/A-COM; the protester argues that in such a situation, the government is obligated to hold another round of discussions. The record shows that the protester had discussed the possibility of submitting such an alternate proposal with the agency, which had on three occasions expressed its position that such a proposal would not meet its requirements. The protester therefore knowingly submitted an unacceptable proposal. We have previously held that an agency is not required to reopen discussions after receipt of BAFOs to determine the acceptability of a deficient alternate proposal first submitted with the BAFO. Inter-Continental Equip., Inc., B-224244, Feb. 5, 1987, 87-1 CPD ¶ 122.

In addition, the protester questions whether in its award decision, the agency considered the impact of M/A-COM's announcement that it was selling its Government Systems Division. In this regard, the record demonstrates that the agency made inquiries of the local contract administration office concerning the sale and subsequently awarded the contract to the firm following an affirmative determination of its responsibility. As stated above, we generally do not review affirmative determination of responsibility. See 4 C.F.R. § 21.3(m)(5) (1989). Furthermore, as the agency notes, no sale has occurred yet and the impact of any future sale upon the government's rights and the contractor's obligations is a matter of contract administration, which is also not for consideration by our Office. 4 C.F.R. § 21.3 (m)(1).

The protest is denied.

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General Counsel