



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oshkosh Truck Corporation; Idaho Norland Corporation

File: B-237058.2; B-237058.3

Date: February 14, 1990

Del Stiltner Dameron, Esq., McKenna, Conner & Cuneo, for the protester, Oshkosh Truck Corporation.

Anne M. Morgan, Esq., Reinhart, Boerner, Van Dueren, Norris & Rieselbach, for the protester, Idaho Norland Corporation.

John A. Schafer, FWD Corporation, an interested party.
Barry Sax, Esq., Office of the General Counsel, Defense Logistics Agency, for the agency.

C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against agency decision to reopen discussions is denied where agency determined that previous request for revised proposals did not provide effective notice to offerors that they were expected to submit best and final offers, and record supports agency's decision to take corrective action.

2. Protest that proposed agency corrective action of reopening discussions is inadequate and that protester should receive award based on initial proposals is denied where record shows that initial proposals were neither technically acceptable nor most advantageous to the government from a price standpoint.

DECISION

Oshkosh Truck Corporation and Idaho Norland Corporation protest separate determinations by the Defense Construction Supply Center, Columbus, Ohio, concerning request for proposals (RFP) No. DLA700-89-R-7520. Oshkosh Truck protests the agency's decision to reopen negotiations and request best and final offers (BAFOs), and Idaho Norland protests the agency's decision not to award the contract to

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it on the basis of initial proposals under the initial small business set-aside.

We deny the protests.

On October 24, 1988, the agency issued the solicitation as a 100 percent, small business set-aside, for a firm, fixed-price contract for production and delivery of 14 snow removal units, with accessories and first article testing, for use by the Air Force. The agency subsequently modified the solicitation to increase the basic quantity to 25, with a 200 percent option.

The solicitation essentially provided for award to the low offeror, and directed offerors to submit price proposals "with a list of any changes to the specification/purchase description upon which their proposals are based." The solicitation further advised offerors that any changes requested would be evaluated and that the agency would then issue an amendment to the solicitation, setting forth all changes approved by the agency, "to afford all offerors the opportunity to submit revised proposals in accordance with the approved specification changes."

The agency received three small business offers on December 12, 1988, the extended date for receipt of initial proposals. Idaho Norland submitted the lowest price, but all three offerors requested changes to the specifications which were referred to the Air Force for a determination of their acceptability. On February 9, 1989, the contracting officer executed a determination reflecting the fact that the Air Force had rejected most of the requested changes, that one offeror had therefore withdrawn, and that a second needed to have its axles re-certified to meet the gross vehicle weight requirement of 54,000 pounds. The contracting officer concluded that the agency had no assurance of receiving a technically acceptable offer from a responsible small business firm other than Idaho Norland.

Based on this determination, the agency amended the RFP on March 13, 1989, to solicit offers on an unrestricted basis. This amendment (No. 0002) contained a list of acceptable deviations from the specifications but also repeated the language, quoted above, to the effect that offerors should provide a list of requested changes to the specifications and that the agency would offer an opportunity to submit revised proposals after advising offerors which changes were approved. On May 12, in response to this amendment (and a third amendment extending the date for submission of proposals), two of the original offerors, including Idaho Norland, submitted revised prices; Oshkosh Truck, a large

business, also submitted a proposal. On July 27, the agency issued amendment No. 0004 to provide for evaluation of option quantities, requesting offerors to submit their "revised proposals" no later than August 11. The amendment did not include a notice that discussions were concluded and did not specifically notify offerors that best and final offers (BAFOs) were requested.

On September 6, 1989, the agency awarded a contract to Oshkosh Truck as the low offeror; Idaho Norland then filed a protest with this Office, objecting to the agency's failure to respond to questions concerning possible ambiguities in the specifications, and to the agency's failure to make a specific request for BAFOs. On October 23, the agency advised our Office that its review of the procurement had raised a concern whether the contracting officer's rationale for dissolving the small business set-aside met Federal Acquisition Regulation (FAR) Subpart 19.5 (FAC 84-48) requirements for such actions. The agency further advised our Office that it intended to take the corrective action of reopening negotiations and that in those negotiations it would attempt to clarify Idaho Norland's remaining technical questions.

Once informed that the agency had taken the corrective action originally sought by the protester, our Office dismissed Idaho Norland's protest as academic. After receiving notice of the agency's intended action, Oshkosh Truck filed a protest on November 3, claiming that the decision to reopen negotiations was unwarranted and violated law and regulation.

Oshkosh Truck contends that the original decision to dissolve the set-aside was allowable under applicable regulations. Oshkosh Truck asserts that, in any event, Idaho Norland is no longer a small business, leaving the agency with no expectation of receiving offers from more than one small business and the necessity of conducting the procurement on an unrestricted basis.^{1/} Oshkosh Truck points out that conducting the additional discussions, as the agency proposes to do, will do nothing to correct the deficiency apparently identified by the agency. Oshkosh Truck therefore argues that there is no justification for taking such corrective action, which would expose Oshkosh Truck to an improper auction.

^{1/} The submissions of the agency and Idaho Norland do not contest this assertion.

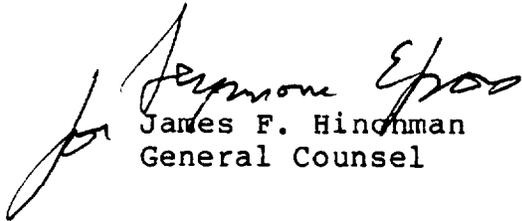
The agency advises our Office that it found merit in Idaho Norland's protest since its review of the file raised genuine questions whether the offerors did in fact treat amendment No. 0004 as a request for BAFOs. The agency reports that the contracting officer had orally advised the offerors that they were only expected to provide option prices with amendment No. 0004, not final offers. The agency also found that, consistent with this advice, one of the three offerors had not responded to amendment No. 0004 and that the other two, the protesters, had made no changes to their proposals beyond providing a price for the options. The contracting officer states that in view of the agency's failure to make a specific request for BAFOs, its failure to give specific notice that discussions were concluded, and the lack of evidence that any of the offerors treated amendment No. 0004 as a request for BAFOs, it was appropriate to reopen discussions with all three offerors.

Generally, in negotiated procurements, agencies must conduct written or oral discussions with all responsible offerors within the competitive range before awarding a contract. Metron Corp., B-227014, June 29, 1987, 87-1 CPD ¶ 642. Upon completion of discussions, the contracting officer must request BAFOs. That request must include notice that discussions are concluded, notice that this is the opportunity to submit a BAFO, and a common cutoff date and time. FAR § 15.611(b) (FAC 84-16). Here, as noted above, the amendment requesting "revised proposals" did not include notice that discussions had concluded and did not alert offerors that it represented a request for BAFOs. Upon investigation, the agency determined that offerors had been prejudiced by its failure to properly request BAFOs. The record indeed contains ample evidence that, in fact, none of the offerors believed amendment No. 0004 to be a request for BAFOs since none of the offerors even attempted to change their prices for other than the option quantity. Thus, the record supports the agency's decision to take corrective action. In this regard, we have recognized that in negotiated procurements, contracting officials have broad discretion to take corrective action where the agency determines that such action is necessary to insure a fair and impartial competition. Loschky, Marguardt & Nesholm, B-222606, Sept. 23, 1986, 86-2 CPD ¶ 336. We therefore cannot find unreasonable the agency's determination that the conduct of the procurement gave no assurance that award was made on a basis most advantageous to the government. Accordingly, we deny Oshkosh Truck's protest.

Similarly, we deny the protest by Idaho Norland which essentially also takes issue with the adequacy of the corrective action proposed by the agency. Idaho Norland

argues that, as the low offeror at the time of initial proposals under the small business set-aside, it should have received award at that time and argues that our Office should direct award of the contract to Idaho Norland as the only acceptable, corrective action. The record before us, including Idaho Norland's own submissions, establishes, however, that none of the initial proposals, including Idaho Norland's, were technically acceptable or most advantageous to the government from a price standpoint.^{2/} If, as Idaho Norland contends, its clearer understanding of the requirements will allow it to submit a proposal much more favorable to the government from a price standpoint than it previously offered, then we cannot find unreasonable the agency's decision to seek a BAFO from Idaho Norland as well as the other offerors.

The protests are denied.


James F. Hinchman
General Counsel

^{2/} Indeed, as Idaho Norland admits, even the price that it submitted under its revised proposal could have been substantially reduced and did not represent its best price.