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DECISION



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

FILE: B-204827

DATE: March 23, 1982

MATTER OF: Harris Corporation

DIGEST:

1. Where the Government does not obtain an accurate and realistic picture of the actual cost needed to make an award to the lowest cost offeror, no award can be made. Record shows that, after determining protester to be the low offeror, agency discovered that solicitation evaluation factor that assumed installation at 1 month after award was erroneous and that certain of protester's discounts would not actually be available because of probable delay in installation of equipment. Therefore, the agency properly concluded that the solicitation had to be amended to show probable dates of equipment installation and that another request for best and final offers had to be made.
2. If discussions are reopened with one offeror after receipt of best and final offers, they must be reopened with all offerors in the competitive range and an opportunity given to submit revised proposals.
3. Where the identity and price of an offeror have been disclosed in announcing an award subsequently determined to be improper, the importance of correcting the improper award through further negotiation overrides the competitive advantage possibly bestowed on another offeror by the disclosure and the prohibition against auction techniques.
4. It is not germane that protester's price data may have been improperly disclosed to agency personnel, since it is not contended nor shown that the information was released outside the Government and, therefore, had an effect on competition.

Harris Corporation (Harris) protests the reopening of negotiations under request for proposals (RFP) No. NO0123-82-R-0148 issued by the Naval Regional Contracting Office, Long Beach, California. The RFP was for the fixed-price procurement of remote data process terminals of varying configurations. The RFP also provided options for additional data process systems within the first 3 years following award of a contract. No award has been made.

Harris states that the Navy decided to request a fourth best and final offer because after looking more closely at the company's cost proposal, the agency felt that certain evaluated discounts could not be realized. However, Harris points out that the RFP had provided that for evaluation purposes all equipment would be presumed to be delivered on the first day of the contract award. Harris goes on to state that the Navy informed it that all pricing, discounts and equipment rental credits should not have been applied from the specified contract award date, but from "conjectured" dates of equipment installation.

Harris therefore raises the following objections to the Navy's fourth request for best and final offers:

1. Harris' low offer under the third request for best and final offers is legal and in complete compliance with the RFP;

2. The fourth request is arbitrary and unfair because it is not made for the purpose of changing the scope of the procurement, but rather for the purpose of the Navy getting an offer that the Navy likes better;

3. Four requests for best and final offers constitute auctioning, because the Navy is extending the procurement in order to get an offer more to its liking;

4. The Navy has provided a significant competitive advantage to Harris' competitors for obtaining the contract; and

5. The Navy has violated procurement regulations which prohibit the identification and quotation of offers to anyone not having a legitimate interest in the offers. Also, Harris alleges that the Navy violated the nondisclosure restriction contained in its price proposal.

Harris urges that we recommend the following remedies in order of priority:

1. Awarding the contract to Harris on the basis of the results of the third request for best and final offers;

2. Have the Navy conduct any further negotiations with Harris only; or

3. Resolicit all requirements because of the impossibility of obtaining fair competition under the protested procurement.

For the reasons set forth below, we deny Harris' protest.

Background

The RFP's basic requirement was for 15 remote process terminals of specified configurations to be delivered to various sites on dates ranging from 90 to 240 days after contract award. The option requirement was for 25 more such terminals. The optional requirement was structured so that the exact configuration of each of the 25 terminals was to be specified at the time of ordering by the Navy. Offerors were requested to submit prices on the basis of purchase, straight lease, lease to ownership and lease with option to purchase.

On the closing date for receipt of proposals, five proposals were received by the Navy. Two of the proposals were rated technically unacceptable and three were rated as acceptable or capable of being made acceptable. Best and final offers were solicited. After evaluation, one of the three proposals initially in the competitive range was rated unacceptable. The proposals of Harris and Four-Phase, Inc. (Four-Phase),

remained acceptable. However, both of these companies' cost proposals were organized in such a way that accurate evaluation of costs could not be made in accordance with the RFP's evaluation criteria. Therefore, the Navy requested second best and final offers from Harris and Four-Phase under an established format that was consistent with the RFP's evaluation criteria. A hypothetical purchase date, after the 37th month for each terminal, was added to the RFP's evaluation criteria so that the Navy could evaluate the offerors' lease with option to purchase plans on an equal basis.

After evaluation of the offers submitted by Harris and Four-Phase under the second request for best and final offers, the Navy found that both companies had structured their offers so that their lease with option to purchase plans could be fairly evaluated in relationship to the time the purchase option was to be exercised. However, each company had proposed totally different configurations for the 25 optional terminals. Four-Phase proposed larger, more expensive terminals while Harris proposed the smallest, least expensive terminal permitted by the RFP. The Navy concluded that the optional terminals could not be evaluated on an equal basis using the lease with option to purchase method. As a consequence, a third round of best and finals was requested and the exact types of optional terminals that the offerors were to propose were specified.

Following the evaluation of the offers submitted under the third request for best and final offers, the Navy determined that lease with option to purchase was the lowest cost method for which funds were available. Under this acquisition method, Harris was evaluated the lowest offeror and a copy of the proposed contract was mailed to the company. The Navy also gave public notice of its intent to award a contract to Harris. Subsequently, however, certain ambiguities were discovered in the terms of Harris' discounts. The Navy had evaluated these discounts on the basis that their availability ran from the dates of the equipment installation. Harris was then contacted for clarification as to the commencement and expiration dates of the discounts. Upon learning that Harris intended to propose the discounts exactly as written in its cost proposal, Harris' costs were reevaluated and were no longer found to be low. Also, the Navy decided that

the RFP evaluation method, which specified that offers would be evaluated as if all installations were accomplished at 1 month after contract award, was unreasonable. Consequently, the Navy concluded that award under the existing RFP evaluation criteria would not be in the Government's best interest and that a fourth request for best and final offers was necessary.

Evaluation of Harris as Low Offeror

The Navy takes the position that Harris is asserting that because it was the evaluated low offeror on the basis of its third best and final offer, award should be made to it and that the Government should not be allowed to change its evaluation criteria and solicit further rounds of best and final offers. In the Navy's opinion, Harris is arguing that once an offer is evaluated as low, award is then automatic. According to the Navy, Harris' argument overlooks the fact that, where the Government does not obtain a realistic picture of the actual low cost sufficient to permit an award, no award can be made. See Reliable Reproductions, Inc., B-201137, February 17, 1981, 81-1 CPD 100. The Navy emphasizes that after it determined that the RFP evaluation factor of installation at 1 month would result in the evaluation of discounts that would not actually be available to the Government, any award to Harris on the basis of the company's third best and final offer would not be in the best interest of the Government.

We agree with the Navy. The record shows that Harris' third best and final offer contained two substantial discounts applicable to its lease with option to purchase plan: a rental credit, which at the 37th month allowed 100 percent of the rental payments to apply to purchase with decreasing credits thereafter, and an additional 32.36-percent discount from the purchase price if the terminals were purchased during months 37 to 42. According to Harris' proposal, the former discount ran from the date of equipment installation, while the latter discount ran from the date of contract award. The record indicates that the Navy evaluated both discounts as if they were available for all the equipment, basic and optional quantities included. Moreover, the Navy evaluated the availability of both discounts as running from the dates of equipment

installation because in the negotiations preceding the third best and final offers, the Navy understood from Harris that this was the company's intent. When it became apparent to the Navy that the 32.36-percent discount commenced on the date of contract award and was not available after 42 months from that date, the Navy had to change its evaluation of Harris' costs. The record reveals that, even assuming that both the basic and optional quantities of terminals would be ordered on the first day of the contract, only seven systems could be installed in time to take advantage of the 32.36-percent discount.

As to Harris' contention that the fourth request for best and final is arbitrary because it does not change the scope of the procurement, we think the record clearly shows that after the evaluation of Harris' third best and final offer, the Navy discovered that the RFP's cost evaluation method had to be changed. In developing anticipated installation dates for the equipment, it became apparent to the Navy that the RFP provision that offers would be evaluated on the basis that installations would be accomplished 1 month after award was unreasonable. The differential between the dates of contract award and anticipated equipment installation was such as to make installation scheduling a critical factor in the evaluation of costs. Therefore, Navy determined that the RFP had to be amended to include the proposed installation dates for the equipment so that the proposals of Harris and Four-Phase could be evaluated on an equal basis.

Furthermore, the Navy could not have conducted discussions on revising the above-mentioned discounts with Harris alone. Defense Acquisition Regulation § 3-805 (1976 ed.) and our decisions require that, if discussions are reopened with one offeror after the receipt of best and final offers, they must be reopened with all offerors in the competitive range and an opportunity given to submit revised proposals. See John Fluke Manufacturing Company, Inc., B-195091, November 20, 1979, 79-2 CPD 367. Harris asserts that paragraph 7(d) of standard form 33A permits the Government to accept a late modification of an otherwise successful bid which makes its terms more favorable to the Government. This provision, however, concerns the situation where a later modification is made to a timely

proposal submitted without further negotiations. Further, Harris has not been found to be the successful offeror. While the company was initially evaluated the low offeror, the Navy could not determine that it was the successful offeror because of the erroneous evaluation of the proposed discounts.

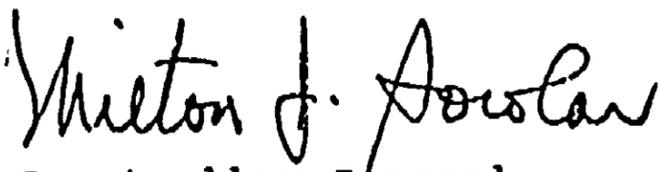
Auction and Competitive Advantage

The Navy contends that the facts in this case fail to show that an auction has occurred. While none of the first three best and final requests, nor the discussions which accompanied them, were conducted like an auction, the Navy did publicly disclose its intent to award a \$6.6 million contract to Harris. An auction situation and possible unfair competitive advantage arise where there has been a disclosure of an offeror's identity and price during an ongoing negotiated procurement. Cincinnati Electronics Corporation et al., 55 Comp. Gen. 1479 (1976), 76-2 CPD 286. However, where the identity and price have been disclosed in announcing an award subsequently determined to be improper, the importance of correcting the improper award through further negotiation overrides the competitive advantage possibly bestowed on another offeror by the disclosure and the prohibition against auction techniques. Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD 256.

Disclosure of Price Data

Harris has contended also that certain of its price data was improperly disclosed to personnel in the Navy. Whether or not the allegation is correct, it is not considered to be germane, since it is not contended nor is it shown that the information was released outside the Navy by the personnel and, therefore, had an effect on competition.

The protest is denied.

for 
Comptroller General
of the United States