

DECISION

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

FILE: B-185566

DATE: April 27, 1976

MATTER OF: Sycor, Inc.

DIGEST:

Where 120-day offer acceptance period expired and technical and cost evaluations could not be completed within acceptance period, request for second round of best and final offers is not objectionable where contracting officer determines that due to changed economic conditions (decline in prime interest rate) original offers may result in unrealistic pricing.

On March 14, 1975, the Defense Supply Agency (DSA) issued request for proposals (RFP) No. DSAH00-75-R-0055 for an indefinite quantity of information display systems. These systems consisted of cathode ray tube display units, controllers, and printers with associated maintenance. Offers under the RFP were to be submitted on a lease only basis, purchase only basis, and lease with option to purchase basis.

The closing date for receipt of proposals was April 28, 1975. Following discussions with those offerors considered technically acceptable, best and final offers were requested and were due on August 15, 1975.

After receipt of the best and final offers, the contracting officer realized that the complex cost and technical evaluations could not be completed within the 120-day offer acceptance period stated in the RFP. Therefore, on December 16, 1975, the contracting officer requested all offerors who had submitted best and final offers to either submit a revised price or to extend the acceptance period of their present offers for 90 more days. In other words, this request by the contracting officer had the effect of reopening price negotiations, thereby permitting another round of "best and final offers." The December 16 letter from the contracting officer did not permit any changes in the technical aspect of a proposal nor did it make any changes in the scope of the RFP but only allowed changes as to price.

B-185566

The above action by the contracting officer has been protested to our Office by Sycor, Inc. (Sycor). Sycor contends that the request for a second round of best and final offers, without a change in the requirements of the RFP necessitating such request, violated the provisions of the Armed Services Procurement Regulation (ASPR) and past decisions of our Office.

Our Office has held that, after negotiations and best and final offers, negotiations should not be reopened unless it is clearly in the best interest of the Government. ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301. We have held that when it is determined, after best and final offers have been submitted, that a change must be made in the requirements of the RFP, a second round of best and final offers incorporating such changes must be requested. See 51 Comp. Gen. 411 (1972); 49 Comp. Gen. 402 (1969) and 48 Comp. Gen. 583 (1969). These changes clearly require a second best and final offer or the Government would not receive its minimum needs.

Here, however, there was no specification change nor other deficiency found in the solicitation or in competing offers. The reason given by DSA as justification for the request of December 16 for new offers rather than further extension of the prior offers was the lengthy period of time which had elapsed since the best and final offers were submitted and the prime interest rate drop during the 120-day period. DSA reasoned that acceptance of the original offers could have resulted in the Government receiving unrealistic pricing for the requirement.

Sycor contends that the reopening of price negotiations violated section 3-805-1(e) of title 32 of the Code of Federal Regulations. This section has been incorporated into ASPR § 3-805.4 (1975 ed.) which contains the procedures to be followed when there is a change in the Government's requirements and amendments should be issued informing all offerors. We do not read the section as stating a limitation on the freedom of the contracting officer to reopen price negotiations. The test as to when negotiations should be reopened is when it is in the best interest of the Government as stated in the above-cited cases. Therefore, we do not find the cited regulations to be a bar to the actions of the contracting officer.

B-185566

Secondly, Sycor argues that by permitting a second round of best and final offers the contracting officer has permitted offerors a "second bite of the apple." This term, we believe, has been used inappropriately. The phrase has the connotation that one bidder or offeror is given an advantage over competing firms. Here, all firms were allowed to make price revisions. Therefore, we do not view the action of the contracting officer as allowing "a second bite at the apple."

Next, Sycor contends that the reopening of price negotiations violated the late offer paragraph contained in the RFP, which states that any offer received after the time specified for receipt will not be considered unless certain criteria are met. This section, it is argued, does not contemplate or authorize more than one best and final offer. We do not believe it is necessary for this section to have included a notice that more than one round of best and final offers might be requested. Determinations as to when to continue or reopen negotiations reside within the contracting officer's discretion. Also, a modified proposal should not be considered a late proposal under this paragraph when the contracting officer specifically announces a reopening of negotiation and invites revised proposals.

Fourthly, Sycor states that the reopening of negotiations as to price constituted an auction which is prohibited by ASPR § 3-805.3(c) (1975 ed.) and that the reopening of negotiations possibly allowed offerors to take advantage of any price leaks which may have occurred during the time offers were being evaluated. There is no evidence in the record before our Office that price leaks occurred. Therefore, we do not believe another round of price negotiations in which all offerors are treated equally constitutes the type of auction prohibited by ASPR § 3-805.3(c).

In summary, we believe the request for new best and final offers was permissible in the instant situation. The prices had been arrived at 4 months prior to the request and had expired. The procuring agency believed that, due to the change in the prime interest rate, it was in the best interest of the Government to request new prices to avoid "unrealistic pricing" for the items.

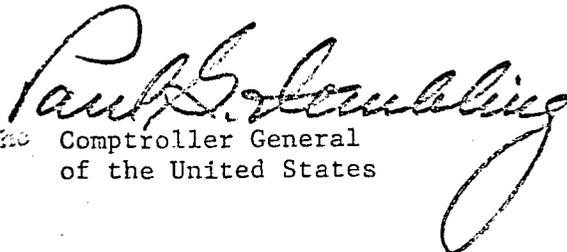
B-185566

Sycor has expressed concern that condoning this practice could lead to offerors, on future procurements, withholding their best prices in expectation that another round of best and final offers will be requested and to procurement officials making a succession of requests for best and final offers in the expectation of lowering prices. However, Sycor's concern does not provide a basis for legal objection where the contracting officer has a valid reason for seeking new prices. Further, any offeror who withholds the best price in contemplation of another round of best and final offers may be doing so at its own peril. As for the instant case, we have reached the holding that the request for new prices was permissible taking into consideration all the facts, including the long offer acceptance period, the change in the economic environment in which offers were prepared and the equal treatment of all offerors. Based on these factors, we find the contracting officer's request to have been in the Government's best interest.

Finally, Sycor states the contracting officer has acted inconsistently by having asked offerors to extend the offer for an additional 30 days following expiration of the above-noted 90-day offer acceptance period. It is argued that to be consistent the contracting officer should have requested another round of best and final offers instead of merely an extension as the prime interest rate has dropped more in the 90-day period than it did during the initial 120-day offer acceptance period.

We do not view this action as inconsistent. The additional 30-day acceptance period was requested in order that our Office could reach a decision on the protest. It is not unusual for an agency to attempt to maintain the status quo in a procurement during the pendency of a protest until a decision is reached.

For the foregoing reasons, the protest is denied.


for the Comptroller General
of the United States