



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: R. & W. Flammann GmbH

File: B-278486

Date: February 4, 1998

Reed L. von Maur, Esq., David Krakow, Esq., and Bryant J. Spann, Esq., Parker, Poe, Adams & Bernstein, for the protester.

Capt. Kyle Hybl and Marian E. Sullivan, Esq., Department of the Air Force, for the agency.

Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against cancellation of request for proposals (RFP) is sustained where reasons given for the cancellation are not supported by the record. Although contracting officer had appropriate concerns regarding the conduct of the procurement, he canceled the procurement without first determining whether "irregularities" which occurred compromised any award under the RFP.

DECISION

R. & W. Flammann GmbH protests the Department of the Air Force's decision to reject all offers submitted under request for proposals (RFP) No. F61521-97-R-2002, issued for the painting of military family housing (MFH), and the agency's decision to resolicit these needs. Flammann believes that the agency has offered no reasonable basis for cancellation and that, as the lowest-priced offeror, it should receive award under the RFP.

We sustain the protest.

The RFP, issued on August 4, 1997, requested prices for interior painting of estimated quantities of MFH apartments at four locations in Germany. Award would consist of a 1-year contract (or one of a shorter duration depending on the date of award) with two 1-year options. The RFP contained the clause at Federal Acquisition Regulation (FAR) § 52.215-16 (Alternate II) (June 1997), which provides that the "Government intends to evaluate proposals and award a contract without discussions with offerors." Ten proposals were received by the September 4 deadline for proposal submission. According to an agency-level protest filed by Pamet GmbH, the owner of Heil Maler GmbH, the third low offeror, telephoned a representative of Pamet on September 5 and stated that, according to an agency individual involved in the procurement, Pamet's offer was low. Pamet also states

that Heil disclosed Heil's price to Pamet. (The agency also obtained a memorandum from Heil showing that these same two offerors had discussed their proposed prices shortly after the proposal submission deadline on September 4, in order to determine possible subcontracting arrangements should either of them receive the award.) The Pamet representative states that on September 5 he called and questioned a second agency individual involved in the procurement and was advised that Pamet was, indeed, the low offeror.

On September 8, Flammann, the second low offeror, advised the agency that it had made two clerical mistakes in its offer. First, it advised that it had incorrectly multiplied the agency's estimated quantity for one line item by its unit price to reach an extended price. The incorrect figure was higher than the correct one. Second, Flammann incorrectly added its total prices for the base and option years to reach an estimated aggregate total higher than would have been the case had the figures been correctly added. These errors, and the intended proposed prices, were obvious from the pricing pages submitted by Flammann with its offer. The contracting officer allowed Flammann to correct the errors and, after correction, Flammann was the low offeror. When Pamet was notified on September 9 that it was no longer low because of the correction of Flammann's prices, Pamet filed an agency-level protest on September 12 against the correction of the prices in Flammann's offer. Pamet also expressed concern with the conduct of the contracting officials. As a result, the agency assigned a different contracting officer to assume responsibility for the RFP.

Upon confirming that the (now) second (Pamet) and third (Heil) low offerors had disclosed pricing information to one another and that government personnel may have disclosed the identity of the low offeror, Flammann, and pricing information, the new contracting officer decided--before any award was made--to cancel the RFP and resolicit the procurement due to possible irregularities in the acquisition process. It was his view that the possible disclosure of prices by someone in the agency to one or two of the offerors compromised the integrity of the procurement. The agency initiated an investigation of the procurement. The agency advises that, after conducting its investigation, it has decided that "a criminal investigation will not be conducted at this time because there is insufficient evidence of specific criminal activity." Further, while administrative action is being taken against the two contracting officials and the two offerors who exchanged pricing information, there has been no suggestion of wrongdoing on the part of Flammann.

Under FAR § 15.608(b)(4) (June 1997), a procuring agency may reject all proposals received in response to an RFP if cancellation is "clearly in the Government's interest." The determination that cancellation is clearly in the interest of the government must have a reasonable basis. Griffin Servs., Inc., B-237268 et al., June 14, 1990, 90-1 CPD ¶ 558 at 2. Here, we conclude that cancellation would be improper and that award should be made to Flammann on the basis of its low offer under the RFP. We agree that the contracting officer was warranted in being

concerned that the integrity of this procurement might have been compromised, and that the matter required prompt investigation. However, the contracting officer's decision to cancel the solicitation without first determining that the "irregularities" actually did compromise an award under this RFP was not reasonable. While the agency asserts that the disclosure of prices detrimentally affected the integrity of the procurement, the contracting officer had no information that anyone benefited from, or was prejudiced by, the disclosure of the prices to the original low offeror and the original third low offeror, neither of whom was able to change its prices to benefit from this knowledge. Further, the contracting officer recognized that there was no evidence suggesting that Flammann was involved in any of the irregularities of concern to the agency. As noted above, Flammann's request for correction concerned errors which were clear from the RFP pricing pages submitted with its offer and were discoverable by the agency upon review of the offer without Flammann's request for correction. Clearly, the contracting officer had not developed facts to support the cancellation at the time he made the decision, and the record presented in this case does not provide that support.

Although the agency now states that discussions were required because seven offerors understated prices for five line items compared to the government estimates, the unit prices proposed by Flammann on each of these line items at issue were not understated (indeed, they were the same as the government estimates). Further, if discussions were conducted with the seven offerors which understated their prices, the result, based on the agency's estimates, presumably would be an increase, not a reduction, in prices for these items. In any event, given the price disclosures which have occurred, resolicitation would simply promote an auction among offerors without any corresponding benefit to the procurement system. See Rexon Tech. Corp.; Bulova Techs., Inc., B-243446.2, B-243446.3, Sept. 20, 1991, 91-2 CPD ¶ 262 at 7-8. Further, the agency has not raised any other matters that would require discussions.

Accordingly, the protest is sustained. We recommend that award be made to Flammann, if otherwise appropriate, on the basis of its low offer submitted under the RFP. We also recommend that Flammann be reimbursed the costs of filing and pursuing its protest, including reasonable attorney's fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1997). Flammann should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

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