



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Spectrofuge Corporation of North Carolina, Inc.--Reconsideration

File: B-281030.3

Date: April 9, 1999

Richard L. Moorhouse, Esq., Holland & Knight, for the requester.
Alison L. Doyle, Esq., McKenna & Cuneo, for Beckman Coulter, an intervenor.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Disclosure of contract award price under prior decision sustaining protest does not provide any basis for General Accounting Office to modify recommendation that agency reopen discussions and solicit another round of best and final offers, because the risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action.

DECISION

Spectrofuge Corporation of North Carolina, Inc. requests that we reconsider our corrective action recommendation that the agency reopen discussions and call for another round of best and final offers (BAFO) in our decision Beckman Coulter, B-281030, B-281030.2, Dec. 21, 1998, 99-1 CPD ¶ 49. In that decision, we sustained a protest filed by Beckman Coulter against the award of a contract to Spectrofuge for preventive maintenance, rotor inspection and emergency repair of certain Beckman scientific instruments/equipment at a government facility, under request for proposals (RFP) No. 273-98-P-0008 issued by the National Institute of Environmental Health Services, Department of Health and Human Services.

We deny the reconsideration request.

In the initial protest, Beckman alleged, among other things, that Spectrofuge's BAFO was technically unacceptable and that an August 13 post-BAFO meeting between a Spectrofuge representative and agency personnel constituted improper discussions and unequal treatment because the agency was thereby giving Spectrofuge an opportunity after the submission of BAFOs to remedy its noncompliant proposal. We sustained the protest because we found that Spectrofuge's proposal did not comply with the RFP requirements for maintenance services, included an unacceptable termination clause, and deviated from the RFP's requirement that offerors submit fixed prices. Specifically, Spectrofuge's proposal (at page 56) included a list of five "Excluded Services" and allowed either party to "terminate

this agreement within 30 days written notice to the other party." In addition, Spectrofuge's proposal contained (at page 57) its Annual Maintenance Service Agreement, which states that "[a]ny component or part determined by Spectrofuge to be defective shall be replaced (upon authorization by the Buyer) at Spectrofuge's then current price." We also indicated that the communications that occurred at the August 13 meeting appeared to constitute improper post-BAFO discussions because they were directed at material terms of Spectrofuge's proposal and materially affected the proposal's potential for award.

Because we found that the agency had improperly accepted for award a materially nonconforming proposal, we recommended that the agency reopen discussions with both offerors, request additional BAFOs and proceed with the source selection process. We also recommended that the agency terminate Spectrofuge's contract for the convenience of the government and award the contract to Beckman if, after evaluating the revised BAFOs, the agency determined that the Spectrofuge proposal was no longer considered the most advantageous for the government. Finally, we recommended that Beckman be paid its costs of filing and pursuing the protest.

In its request for reconsideration, Spectrofuge objects to the recommended corrective action, arguing that because Spectrofuge's and Beckman's prices have been revealed, reopening negotiations with the two firms and requesting another round of BAFOs would create an improper auction. Spectrofuge also asserts that Beckman was not prejudiced by the post-BAFO discussions and points out that our decision contains "no finding that Beckman would have had a reasonable opportunity of obtaining the award if it also had been afforded another BAFO round." Request for Reconsideration at 2. Spectrofuge contends that corrective action should be limited to the recommendation that Beckman be allowed to recover its proposal preparation costs.

Spectrofuge's contention is without merit. It is fundamental that a materially noncompliant proposal cannot form the basis of an award. Barents Group, L.L.C., B-276082, B-276082.2, May 9, 1997, 97-1 CPD ¶ 164 at 10; Martin Marietta Corp., B-233742.4, Jan. 31, 1990, 90-1 CPD ¶ 132 at 7. Further, contrary to Spectrofuge's contention that Beckman was not prejudiced, here, while Beckman proposed the required fixed prices, Spectrofuge's noncompliant proposal reserved for Spectrofuge the right to escalate its prices and charge an unspecified amount, subject to denomination by Spectrofuge as its then current price, for replacement of defective parts. Our recommendation that the agency reopen discussions with the offerors even though prices have been revealed is the appropriate means of remedying the improper award and providing Spectrofuge an opportunity to properly modify its proposal to comply with the RFP's requirements. As we have made clear in similar situations, the risk of an auction is secondary to the importance of correcting an

improper award and preserving the integrity of the competitive procurement system through appropriate corrective action. Telesec Library Servs.; Dep't of Agriculture--Recon., B-245844.3, B-245844.4, Aug. 13, 1992, 92-2 CPD ¶ 103 at 4; Canadian Commercial Corp., B-246311, Feb. 26, 1992, 92-1 CPD ¶ 233 at 6.

The request for reconsideration is denied.

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