

The contracting officer states that the conditions on the reverse side of each page of Foote's proposal, and provisions on page 7 and 8 of the offer are in direct conflict with the terms and conditions of the solicitation, rendering the proposal "nonresponsive." The contracting officer concludes the "F.O.B. Danville, KY" clause contradicts the requirement that material for use in the required construction be delivered to the construction site and that the provision that electrical connections be provided by others conflicts with section 01010, part 1.02 D.2 of the specifications requiring the contractor to provide such connections. The contracting officer further notes that Foote's payment terms differ from those of the RFP, General Provision 35. Finally, we note that General Provision 32, requiring the contract price to include all federal, state and local taxes, is contravened by Foote's disclaimer excluding such state and local taxes from its proposal price. The contracting officer did not identify this provision as a concern.

Foote argues that the "boiler plate" conditions on the reverse of the proposal were for technical information only and were not meant to supersede the terms and conditions of the RFP. It claims that by signing the solicitation it agreed to perform the contract in strict accordance with, and subject to, the solicitation requirements.

Foote claims that although the F.O.B. Danville, KY, delivery clause is present in its proposal, the proposal also states that all material will be delivered to the job site. Foote asserts that the inclusion of the "electrical connections by others" phrase was error, and states that a Postal Service contracting official understood, after oral consultation, that the sentence is inapplicable. Foote notes that its proposal elsewhere includes making all necessary electrical connections. The protester states that its request for advance or progress payments was based on milestones which could be modified to coincide with milestones established by the Postal Service.

Foote also cites Postal Contracting Manual (PCM) 2-404.2 d (vi) and 2-405 apparently for the proposition that it should be allowed to delete the objectionable conditions. These regulations, which apply to sealed bids, allow for deletion of bid conditions which go to the form, that is, which have only a trivial or negligible effect on price, quantity, quality, or delivery of the goods or services being procured, and not to the substance, of the bid.

Both the protester and the contracting officer have characterized the issues in this protest as matters of "responsiveness." Responsiveness^{2/} is a principle that applies only to formally advertised procurements. Here, the solicitation contemplates a negotiated contract, and so the rules of responsiveness, including the PCM provisions cited by Foote in support of its protest, are inapplicable. See Sea-Land Service, Inc., P.S. Protest No. 77-5, April 15, 1977. We understand the contracting officer's comments that Foote's proposal was "nonresponsive" to mean that he considers it technically unacceptable and therefore outside the competitive range (see PCM 3-805.1) for failure to meet essential requirements of the RFP. Sea-Land Service, Inc., supra.

Award to an offeror which does not propose to meet specific RFP requirements is

^{2/} "A responsive bid is an offer to perform, without exception, the exact thing called for in the invitation." Siska Construction Company, Inc., P.S. Protest No. 85-73, December 31, 1985.

improper, since award must be on the terms on which the competition was conducted. However, where an initial proposal is not fully in accord with the RFP requirements, the proposal should not be rejected if the deficiencies are reasonably susceptible of being corrected and the offer made acceptable through negotiations. Universal Shipping Co., Inc., Comp. Gen. Dec. B-223905.2, April 20, 1987, 87-1 CPD & 424. Although there is no requirement that negotiations be conducted with an offeror whose proposal has been declared technically unacceptable or not within the competitive range, a basic element of negotiations is providing offerors whose proposals are susceptible of being made acceptable an opportunity to correct deficiencies through the submission of revised proposals. H & B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984.

The contracting officer's actions were proper therefore only if his evaluation of Foote's proposal as technically unacceptable and not capable of readily being made acceptable had a rational or reasonable basis and treated all offerors equally and fairly. See Id.; Inforex Corporation C3 Inc., Datapoint Corporation, P.S. Protest No. 78-12, June 26, 1978. As a general rule, the competitive range in a negotiated procurement consists of all proposals having a reasonable chance of being selected for award, including deficient proposals that are reasonably susceptible of being made acceptable through negotiations. However, even if a proposal is capable of being made acceptable, it need not be included in the competitive range when the contracting officer determines that it has no reasonable chance of being selected for

award. Information Systems & Networks Corporation, Comp. Gen. Dec. B-220661, January 13, 1986, 86-1 CPD & 30. A proposal may be deemed technically unacceptable without seeking additional information from the offeror if the necessary additional information would be substantial, requiring a major revision. Computer Systems & Resources, Inc., P.S. Protest No. 86-4, March 27, 1986.

Factors which we consider in determining whether Foote's proposal was properly excluded from the competitive range include: the extent to which the RFP called for detailed information, whether the deficiencies indicate a lack of understanding of the solicitation requirements, whether curing the deficiencies would require an entirely new proposal, the number of offerors remaining in the competitive range,^{1/} and the cost savings afforded by the rejected proposal. See La Pointe Industries, Inc., Comp. Gen. Dec. B-222023, May 14, 1986, 86-1 CPD & 461.

Here, the revisions necessary to make Foote's proposal technically acceptable are not the sort which would require major revision. Deletion of the conditions could be done with ease. Likewise, the other deficiencies in Foote's proposal seem to be of a type amenable to correction through proper negotiations. The sum of the deficiencies in Foote's proposal does not render it incapable of being made technically acceptable through negotiations.^{1/} Although it would have been a relatively simple

^{3/} Any evaluation resulting in only one offeror being included in the competitive range will be closely scrutinized in view of the importance of achieving maximum competition in government procurements. Coopers & Lybrand, Comp. Gen. Dec. B-224213, January 30, 1987, 87-1 CPD & 100. In addition to excluding Foote from the competitive range, the contracting officer also excluded the second offeror as "nonresponsive" due to an incomplete and conditioned proposal. The propriety of this determination is not before us for review. As the competitive range consisted of one offeror, we must closely examine whether the contracting officer acted reasonably in deciding that Foote's offer required revisions of such a magnitude as to be tantamount to the submission of a new proposal.Id.; See also Electronic Warfare Associates, Comp. Gen. Dec. B-224504, B-223938, November 3, 1986, 86-2 CPD & 514.

^{4/} Applying the remaining factors of the LaPointe test to the facts, we note that the RFP did not call for detailed information, the deficiencies in the proposal do not, necessarily, indicate a lack of understanding of the RFP, only one offeror remained in the competitive range, and the rejected proposal represented a cost savings to the Postal Service. All these factors weigh in favor of including Foote within the competitive range.

matter for the objectionable portions of Foote's offer to be corrected, no negotiations were held with Foote.^{4/} The contracting officer's out of hand rejection, without affording an opportunity for Foote to correct its proposal, despite its stated willingness to do so, would have been proper were this procurement by sealed bid, see Southwood Builders, Inc., P.S. Protest No. 87-44, June 3, 1987; Pease Management and Construction Inc., P.S. Protest No. 86-68, October 24, 1986, but was inappropriate in the context of a negotiated procurement. Therefore, we conclude that the contracting officer's rejection of Foote's proposal was not founded on a reasonable basis and was improper.

We cannot, however, substitute our judgment for that of the contracting officer and direct the consideration of Foote's offer. See H & B Telephone Systems, supra. Cases in which relief has been ordered after award had been improperly made recognize that such relief requires termination for the convenience of the Postal Service, an action that will only be taken if it is in the best interests of the Postal Service. See Rentco Division, Fruehauf Rental Equipment, Inc., P.S. Protest No. 75-74, December 19, 1975; Hydralifts, Inc., P.S. Protest No. 75-41, November 3, 1975. As we have previously stated:

Whether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission. Honeywell Information Systems, Inc., Comp. Gen. Dec. B-186313, (April 13, 1977), 77-1 CPD & 256, p.7.

Inforex Corporation, supra.

Applying these factors to the facts at issue, we consider the procurement deficiencies to be serious; however, the degree of prejudice to Foote or to the integrity of the procurement system

^{5/} A proposal capable of being made acceptable need not be included in the competitive range if the contracting officer determines it has no reasonable chance of being selected for award. Information Systems, supra. The contracting officer has not and could not so determine. As Foote's proposal was the lowest received, it must, if technically acceptable, have a reasonable chance of being selected for award.

is uncertain and speculative.¹⁴ Likewise, no question as to the good faith of the parties has been raised. We have been informed by procurement officials that work on the project has begun and the cost of termination to the Postal Service would be substantial. The contractor has taken measurements and placed orders for the fabrication of the tray transport system. Of overriding importance, however, is the urgency of the requirement. The record is replete with references to the need for speedy completion of the project. Termination at this point would interfere with accomplishment of the Postal Service's mission. We have, in the past, given much weight to the urgency of the project in deciding upon a remedy. See Acco Industries Inc., P.S. Protest No. 79-49, January 30, 1980; Ramsay Products, Inc., P.S. Protest No. 80-78, March 16, 1981. We therefore will not direct termination of the contract, but we note that "the degree of prejudice to the integrity of the competitive procurement system will prove not to have been great provided that the lessons of this procurement are observed in future ... procurements." Inforex Corporation, supra. The contracting officer should take steps to ensure that contracting personnel dealing with procurements understand the difference between negotiation and procurement through sealed bids.

The protest is sustained to the extent indicated.

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^{6/} Any determination by this office of the results of reevaluations would be speculation on our part, in which we decline to engage.