



Comptroller General
of the United States
Washington, D.C. 20548

156092

Decision

Matter of: Travois Medical, Inc.

File: B-266068

Date: January 23, 1996

DECISION

Travois Medical, Inc. protests the award of a purchase order to Johnson & Johnson Hospital Services under request for quotations (RFQ) No. 284-95-Q-0245, issued by the Indian Health Service (IHS), an agency within the Department of Health and Human Services, for a quantity of cold sterilization solution.

We dismiss the protest.

The IHS issued the RFQ for 89 packages of the sterilization solution (4 quart bottles comprise one package) with delivery required "ASAP [as soon as possible]." Although the RFQ itself did not indicate that the requirement was set aside, the agency treated the RFQ as a set-aside for Indian-owned firms. The RFQ was mailed to seven companies.¹ By the August 4, 1995 due date for quotations, the IHS received two quotations of \$20 per package and \$14.69 per package. Those quotations exceeded the previous price of \$10.28 per package by 95 and 43 percent. Consequently, based on the recent procurement history for this item, the contracting officer determined that the quotations received were unreasonably priced and withdrew the requirement from the set-aside program.

On August 22, the contracting officer contacted Johnson & Johnson, the previous supplier for this item and orally solicited a quotation. In response, Johnson & Johnson quoted \$10.28 per package. The contracting officer considered that price to be fair and reasonable and placed an oral order for 80 packages that same day; a written confirming purchase order was issued to Johnson & Johnson on August 23.

Meanwhile, having learned of the issuance of the RFQ from one of the firms to whom the RFQ had been issued, Travois, a small, Indian-owned firm, contacted an agency contracting specialist on August 23 to submit an oral quotation. Upon being

¹The agency reports that although the protester is on the mailing list of Indian-owned businesses, the agency inadvertently failed to mail a copy of the RFQ to the protester.

told the price quoted for this item by Johnson & Johnson, Travois submitted a matching oral quote of \$10.28 per package for an "equal" sterilization solution and indicated that its price was negotiable. Travois confirmed its quotation by facsimile dated August 23.

The agency reports, however, that since an order had been placed with Johnson & Johnson it would not disturb the award in order to further solicit revised quotes as this would give rise to the appearance of an auction. The contracting officer also considered this decision reasonable in light of the time needed to conduct a pre-award survey to verify that Travois had obtained approval for its "comparable" sterilization solution from the U.S. Food and Drug Administration. Because the inventory for this item was very low, any delay in the purchase would put the agency in a critical back order status; therefore, the contracting officer decided to let the award stand. On August 28, the protester contacted the agency and was told that award had been made to Johnson & Johnson. This protest was filed with our Office on September 12.

Travois first argues that the IHS improperly withdrew the Indian-owned set-aside since the two Indian-owned firms that responded to the RFQ had, in fact, submitted reasonably priced quotations. The protester also argues that the requirement should not have been awarded to a large business since, according to the protester, purchases under \$25,000 are required to be set aside for small businesses. Also, according to Travois, the agency improperly failed to obtain the concurrence of the agency's Small Disadvantaged Business Utilization Specialist prior to dissolving the set-aside.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests based on other than an apparent solicitation impropriety—such as Travois' challenge to the withdrawal of the set-aside—must be filed within 10 working days from when the protester first knew, or should have known, its basis of protest. 4 C.F.R. § 21.2(a)(2) (1995). The record shows that Travois was, or should have been aware from its August 23 contact with the contracting specialist (a day after the contracting officer had placed the order with a large business), that the competition was unrestricted. During that telephone conversation, Travois was informed that a quotation had been accepted from Johnson & Johnson, a large, non-Indian-owned business. Based on that conversation, we think Travois should have understood that the competition was no longer restricted to Indian-owned firms nor set aside for exclusive small business participation. Since Travois did not challenge the agency's decision to cancel the small business and Indian set-asides until more than 10 working days after its August 23 telephone contact with the agency, its protest on these grounds is untimely. 4 C.F.R. § 21.2(a)(2).

Accordingly, the protest is dismissed.²

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²Since we find Travois' objections to the dissolution of the Indian-owned set-aside and the failure to set aside the requirement for small business participation are untimely, we will not consider Travois' continued objections that the award to Johnson & Johnson, a large business, constituted an abuse of discretion. As stated previously, the contracting officer decided to withdraw the set-aside and obtain its requirements on an unrestricted basis. Under these circumstances, the contracting officer could properly accept the quotation received from Johnson & Johnson because Travois did not timely object to the agency's decision to obtain its requirement on an unrestricted basis. Finally, since the agency had already placed an order with Johnson & Johnson the previous day, the agency was not compelled to consider Travois' August 23 quotation.