

**DOCUMENT RESUME**

01492 - [A075109R]

[Low Bidder under IFB for Stopwatches Filed Protest With Procuring Agency]. B-187335. January 28, 1977. 5 pp.

Decision re: Wakkann Watch Co., Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services:  
Definition of Performance Requirements in Relation to Need of the Procuring Agency (1902).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: General Government: Other General Government (806).

Organization Concerned: ANF, Inc.; American Athletic Equipment Div.; General Services Administration.

Authority: \* C.F.R. 20.2(a). B-184105 (1975). B-184408 (1976). B-185103 (1976). F.P.R. 1-3.103. F.P.R. 1-3.805-a(a). 51 Comp. Gen. 479. 51 Comp. Gen. 481. 50 Comp. Gen. 246.

Company protested the award by GSA of contracts for stopwatches and timers to competitor, alleging premature solicitation and that the agency failed to enter properly into negotiations with protester. The protest was untimely, as was the protest that the agency prematurely resolicited for items before it resolved the protest. (RRS)

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**DECISION**



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

J. Cohen  
Proc I

FILE: B-187335

DATE: January 28, 1977

MATTER OF: Wakmann Watch Company, Inc.

**DIGEST:**

1. Low bidder under IFB for stopwatches filed protest on May 18 with procuring agency against decision to reject all bids. On June 16, agency issued RFP for same requirement, with June 30 closing date for receipt of initial proposals. Notwithstanding that date protester received agency's June 24 denial of its protest is unclear, subsequent protest to GAO, filed August 30, should at latest have been filed within 10 working days of June 30, since consideration of proposals without taking requested corrective action in regard to canceled IFB constituted "adverse agency action" under section 20.2(a) of our Bid Protest Procedures.
2. Protest that agency prematurely resolicited for items before it resolved protest against rejection of all bids under initial solicitation is untimely, since it was not filed prior to closing date for receipt of proposals provided in resolicitation.
3. Protester has not met burden of affirmatively proving allegation that agency improperly failed to enter into negotiations with it where agency provides evidence that proper negotiations were in fact conducted with all offerors, including protester.
4. FPR provision at section 1-3.103(b) requiring that promptly after making award contracting officer normally shall give written notice to unsuccessful offerors that their proposals were not accepted, is procedural in nature, and failure to comply with it provides no legal basis to disturb otherwise valid award.

Wakmann Watch Company, Inc. (Wakmann), protests certain actions taken by the General Services Administration (GSA) in regard to two

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solicitations for stopwatches and timers, issued by the Federal Supply Service.

Wakmann was the low bidder on the stopwatches under the first solicitation, invitation for bids (IFB) No. 3FP-A2-R-3874-1-29-76, opened on January 29, 1976. However, after bid opening it was determined that the 120-day delivery specified in the IFB for those items was unreasonable because of the normal delivery lead time of the required Government-owned supplier of jewel bearings. That determination was based on a Plant Facilities Report dated March 3 concerning Wakmann's responsibility, which indicated that the best possible lead time for delivery of the watches would be 240 days after award. Consequently, all bids for the stopwatches were rejected. Wakmann protested that action to GSA by mailgram dated May 18.

On June 16, request for proposals (RFP) No. 3FP-BG-T-4056-6-30-76 was issued for the stopwatches, requiring initial proposals to be submitted by June 30. GSA responded to Wakmann's protest of May 18 by letter dated June 24, stating the reason for the rejection of bids, and that the item was being procured under a negotiated solicitation, which Wakmann would receive shortly, with a more realistic delivery time.

Four offers were received in response to the RFP. Award was made on August 6 to American Athletic Equipment Division, AMF, Inc. (AMF), at a unit price of \$25.65. Wakmann, whose price, evaluated with its offered discount, was \$25.685 per unit, states that it did not learn of the award to AMF until August 25, when it contacted the contracting officer concerning the status of the procurement.

Wakmann filed a protest in our Office on August 30, contending that GSA's rejection of all bids under the first solicitation on the basis of an unreasonable delivery time requirement was improper. In this connection, Wakmann states:

"Wakmann was the recipient of the award in the original Solicitation \* \* \*. If the GSA when preparing the Solicitation made a mistake in estimating lead times for the delivery of components, this should in no way affect the validity of the original contract award \* \* \*."

Wakmann also argues that the second solicitation was "void from the outset" since it was issued prior to GSA's June 24 resolution of

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Wakmann's protest of May 18, and that GSA improperly failed to conduct negotiations with Wakmann under the RFP or to advise Wakmann of the award to AMF prior to August 25.

Concerning the rejection of bids under the first solicitation, which was the subject of Wakmann's May 18 protest to GSA, section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. part 20 (Procedures), provides in pertinent part:

"\* \* \* If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 [working] days of formal notification of \* \* \* initial adverse agency action will be considered \* \* \*."

We have been unable to determine the date Wakmann received GSA's letter of June 24 denying Wakmann's May 18 protest to that agency. However, the consideration of proposals under the second solicitation without taking the corrective action requested by Wakmann with regard to the first solicitation must be considered "adverse agency action" within the meaning of our Procedures. United States Steel Corporation, USS Chemicals Division; Flight Systems, Inc., Rocket Jet/ASD Division, B-184105, August 19, 1975, 75-2 CPD 116. Therefore, Wakmann's protest to our Office involving the issue initially protested to GSA, filed here on August 30, should have been filed within 10 working days after June 30, the date GSA received and began consideration of the initial proposals submitted in response to the subject RFP. Accordingly, that issue will not be considered on its merits.

In regard to the time of issuance of the second solicitation, section 20.2(b)(1) of our Procedures provides:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to \* \* \* the closing date for receipt of initial proposals shall be filed prior to \* \* \* the closing date for receipt of initial proposals."

That provision is applicable to protests against the issuance of a solicitation as well as to protests against a particular defect in a solicitation. Monogram Industries, Inc., B-184408, January 2, 1976, 76-1 CPD 3. Since Wakmann's protest that RFP No. 3FP-BG-T-4056-6-30-76 was issued prematurely was not filed by June 30, the closing date for receipt of initial proposals under that solicitation, the merits of this contention will not be considered.

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In response to the allegation that GSA improperly failed to enter into negotiations with Wakmann, GSA has provided our Office with a "Contact Record" summarizing telephone conversations between the contracting officer and the four offerors under the RFP concerning "Last call for changes in price or delivery." The document indicates that on July 1 and 2 the three offerors other than Wakmann were called, and each stated that its initial proposal should be considered its best and final offer. The Contact Record further indicates that Wakmann was called on both of those dates, but no person with authority to negotiate was available at either time; however, on July 7 the individual designated in Wakmann's offer as its "contact for contract administration" was contacted and advised the contracting officer that Wakmann did not want to change its price or delivery terms.

The oral discussions reflected in the Contact Record clearly constituted "negotiations." See Federal Procurement Regulations (FPR) § 1-3.805-1(a) (amend. 153 1964 ed.). Moreover, if GSA had negotiated with all offerors except Wakmann, such action would have been improper. See 51 Comp. Gen. 479, 481 (1972); 50 Comp. Gen. 246 (1970). However, the protester has the burden of affirmatively proving its case, Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337, and, in view of the contracting officer's Contact Record, that burden has not been met here. Accordingly, we must conclude that GSA in fact properly conducted negotiations with all four offerors, including Wakmann.

Finally, concerning notice of the award to AMF, FPR § 1-3.103(b) (Circ. 1 1964 ed.) provides:

"Promptly after making awards in any procurement in excess of \$10,000, the contracting officer normally shall give written notice to the unsuccessful offerors that their proposals were not accepted. \* \* \*"

Notwithstanding whether the contracting officer should have notified Wakmann prior to August 25 of the award, we believe that the notice requirement is, by its terms, procedural in nature, and a failure to comply with it would provide no legal basis for disturbing an otherwise valid award. Moreover, in view of our position as to the merits

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of Wakmann's timely substantive protest, the August 25 notice did not prejudice Wakmann's situation. Cf. The Display House, Incorporated, B-180955, July 25, 1974, 74-2 CPD 58.

The protest is denied.

  
Deputy Comptroller General  
of the United States