

DOCUMENT RESUME

03293 - [A2293409]

[Protest against Denial of Award Based on Preaward Survey].
B-188768. August 12, 1977. 3 pp. + 2 enclosures (2 pp.).

Decision re: Lion Recording Services, Inc.; by Milton Socolar
(for Paul G. Dembling, General Counsel).

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: Rodel Audio Services; United States
Information Agency.

Authority: F.P.R. 1-1.1205-4. F.P.R. 1-2.407-1(a). F.P.R.
1-1.708-2(1). 4 C.F.R. 20.2(b) (2).

The protester contended that their facilities met the requirements specified in the invitation for bids and that the contract should have been awarded to them as the low, responsive, and responsible bidder. The agency conducted two preaward surveys of the bidder's facilities and lengthy discussions with the protester concerning doubts as to their capacity to perform. The protest concerning rejection of the protester's low bid filed with GAO more than 10 days after receipt of the agency's written notice of award was untimely and was not considered on its merits. (Author/SC)

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DECISION

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

FILE: B-188768

DATE: August 12, 1977

MATTER OF: Lion Recording Services, Inc.

DIGEST:

Where agency conducted two preaward surveys of bidder's facilities, and conducted lengthy discussion with protester concerning doubts as to capacity to perform, protest concerning rejection of protester's low bid filed with GAO more than 10 days after receipt of agency's written notice of award, to second low bidder is untimely and not for consideration on merits.

Lion Recording Services, Inc. (Lion), protests the award of contract No. IA-18257-22 by the United States Information Agency (USIA) to Rodel Audio Services (Rodel) for sound recording, transfer and mixing services and materials for the period March 11, 1977, through March 10, 1978, resulting from invitation for bids (IFB) No. 29-22-7.

USIA issued the IFB on January 4, 1977. Bid opening was held on February 3, 1977; three bids were received, and Lion was the apparent low bidder. On February 22, 1977, USIA personnel conducted a preaward survey of Lion's facilities, pursuant to Federal Procurement Regulations (FPR) § 1-1.1205-4 (1964 ed. amend. 95). The survey team found the protester's premises deficient with regard to the isolated, sound-proof control room for film mixing and the number of 16 m.m. dubbers required by the IFB specifications, and suggested on the basis of these deficiencies that Lion could not accommodate some of USIA's film mix requirements. When USIA's contracting officer telephonically informed the protester of the survey findings on the following day, Lion denied the deficiencies. A second survey was, therefore, conducted on February 24, 1977, which the Agency asserts confirmed the deficiencies previously noted. As a result, the second survey report concluded that award to Lion would not be in USIA's best interest. The contract was awarded to Rodel, the second low bidder, on March 4, 1977. The protester was advised by letter of the same date, as follows:

"Thank you for submitting a bid in response to the referenced solicitation. We regret that we cannot bring good news of a contract award to every firm that responds. For this solicitation, the contract was awarded to Rodel Audio Services.

Your interest in the Agency's requirement is greatly appreciated."

Lion received the Agency's notice of award on March 5, 1977. Without further contacting USIA, Lion, by letter of March 9, 1977, requested an explanation for the rejection of the firm's bid from its congressional representative. USIA replied to the Congressman's inquiry by letter of March 29, 1977, stating that award was not made to Lion on the basis of the findings of the second preaward survey. A copy of USIA's response was forwarded to Lion and was received by the protester on April 4, 1977.

Lion filed its protest with our Office on April 5, 1977. Counsel for the protester contends that Lion's facilities meet the requirements specified in the IFB, that as the low, responsive, responsible bidder award should have been made to Lion, that the contracting officer's action in failing to make award to Lion was arbitrary and capricious, and that award to a higher-priced bidder was violative of FPR § 1-2.407-1(a) (1964 ed. amend. 139).

USIA asserts that the protest is untimely and not for consideration on the merits, citing our Bid Protest Procedures, 4 C.F.R., part 20 (1976 ed.), specifically subsection 20.2(b)(2), which requires that:

"* * * bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

The Agency contends that as a result of the February 23, 1977, telephone call to Mr. Lion concerning the deficiencies observed during the first preaward survey and as a result of the conversation Agency personnel had with Mr. Lion during the second survey Lion knew, or should have known, the basis for the protest when the firm received the Agency's notice of award to another firm on March 5, 1977.

Counsel for the protester, however, asserts that because Mr. Lion believed that he had adequately answered the USIA survey team's inquiries during the second preaward survey, the protester had no reason to assume upon notice of award that the deficiencies previously mentioned were the reasons for rejection of the bid.

While Lion was not advised in the notice of award that award was not made to the firm because of the preaward survey findings, the fact that USIA surveyed the premises twice was a clear indication to Lion that the Agency had doubts as to Lion's capacity to perform the contract. Further, it is reported that during the second survey there "transpired a lengthy discussion of the failure of Lion to have a separate booth for voice recording and the six-dubber capability." While Mr. Lion reportedly thought he had satisfied the doubts concerning capacity, we believe that upon

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receiving notice of award to the second low bidder Mr. Lion reasonably knew or should have known that the firm did not receive the award because the doubts concerning capacity had not in fact been satisfied.

Since Lion's protest was filed with our Office more than 10 working days after the basis for the protest was, or should have been, known, the protest is untimely and not for consideration on the merits.

We note, however, that although Lion is apparently a small business concern, USIA did not comply with requirement of FPR § 1-1.708-2(a) (1964 ed. amend 71), which requires referral of nonresponsibility determinations based upon lack of capacity to the Small Business Administration for consideration. We are calling this matter to the attention of the Director of USIA to prevent a recurrence in future procurements.

Milton Fowler
for Paul G. Dembling
General Counsel



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

IN REPLY
REFER TO:

B-188768

AUG 12 1977

The Honorable John E. Reinhardt
Director, United States Information Agency

Dear Mr. Reinhardt:

Enclosed is a copy of our decision of today declining to consider on the merits the protest of Lion Recording Services, Inc., against the award of a contract by the United States Information Agency, under invitation for bids No. 29-22-7, to Rodel Audio Services.

As indicated in the decision, the protest was not timely filed with our Office because the protester requested an explanation for the rejection of its bid from a congressman and filed the protest upon receipt of that information more than 10 working days after receipt of the agency's notice of award. In the circumstances of this case, we believe there was reason to believe that the unsuccessful low bidder may protest the award. Therefore, the notice of award should have indicated generally the reasons for which the low bid was rejected. See FPR § 1-2.403(-). Further, the matter of Lion's lack of capacity was not referred to SMA as required by FPR § 1-1.703-2(a).

We bring these matters to your attention in order to prevent recurrence of these deficiencies in the future.

Sincerely yours,

MILTON SOCOLAR

For Paul G. Dembling
General Counsel

Enclosure



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

IN REPLY
REFER TO: B-188768

AUG 12 1977

The Honorable Harry F. Byrd, Jr.
United States Senate

Dear Senator Byrd:

We refer to your letter of April 7, 1977, concerning the protest of Lion Recording Services, Inc., against the award of a contract under solicitation No. 29-22-7, issued by the United States Information Agency.

By decision of today, copy enclosed, we have found the protest untimely and not for consideration on the merits.

Sincerely yours,

MILTON SOCOLAR

FOR
Paul G. Dambing
General Counsel

Enclosure