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DECISION

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

FILE: B-188914

DATE: January 31, 1978

MATTER OF: Homemakers Upjohn

DIGEST:

1. Interested party which was not furnished copy of protest documents or advised to communicate directly with GAO during the protest is entitled to have its views considered on reconsideration, notwithstanding its failure to submit comments during the original proceedings. However, additional facts presented upon reconsideration provide no basis to conclude that the original decision was erroneous.

2. Protest not filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action on protest filed with agency is untimely and will not be considered on the merits.

Homemakers Upjohn (Upjohn) requests reconsideration of our decision Homemaker Health Aid Service, B-188914, September 27, 1977, 77-2 CPD 230. In addition, Upjohn protests the award of a contract under request for proposals (RFP) 7724-7 issued by the Department of Human Resources, Government of the District of Columbia (DC).

1. Reconsideration

Upjohn, although an interested party to the protest, did not file comments, and thus would not ordinarily be entitled to request reconsideration under section 20.9(a) of our Bid Protest Procedures, 4 C.F.R. 20.9(a) (1977). That provision provides in pertinent part that:

> "Reconsideration of a decision of the Comptroller General may be requested by * * * any interested party who submitted comments during consideration of the protest* * * ."

Upjohn claims, however, that it was not apprised by DC of the pendency of the protest at this Office, and thus was not afforded an opportunity to "participate in the protest procedures in any way." Since DC does not assert that Upjohn was furnished copies of the protest documents or advised to communicate further directly with GAO as provided for by 4 C.F.R. 20.3 (1977) and as requested by our letter to DC at the outset of the proceedings, and because our decision was adverse to Upjohn's interests, we believe that firm's views are entitled to consideration.

Our prior decision involved a protest by Homemaker Health Aid Service (HHAS) of the award of a contract to Upjohn under DC request for proposals (RFP) 1-F, for homemaker and health aid services during the period from May 1, 1977 to April 30, 1978. The RFP requested "fixed-price hourly rates" for various categories of service, with payment to be made at those rates for the actual services rendered. Price proposals were evaluated on the basis of the hourly rates proposed by each offeror. Upjohn offered such "fixed-price hourly rates," subject, however, to escalation at the discretion of Upjohn. Since escalation provisions were not included in the RFP, we recommended that negotiations be opened with all offerors and if escalation were to be permitted, that an appropriate escalation clause be included in the RFP by amendment to allow all offerors to compete on an equal basis.

Upjohn argues that DC did not apprise this Office that two other bidders inserted an escalation clause in their proposals and "thus it was apparent to at least two other experienced bidders that the RFP did not disallow this." The point is, however, not that the RFP "did not disallow" an escalation

clause, but rather that it did not "allow" for such a provision. Our decision addressed at length the requirement that competitive negotiations be conducted in such a manner that all offerors be given the opportunity to compete on an equal basis under identical statements of the agency's requirements, and thus need not be repeated here. The fact that two other offerors (out of seven) proposed similar escalation provisions does not negate our conclusion that proposals containing an escalation provision properly could be accepted only if the RFP were amended to provide for escalation.

Upjohn also states that:

> "Homemakers Upjohn submitted a line item budget with its proposal as did all other bidders. At the time of the bidding we * * * were aware that the District of Columbia was considering an increase in the minimum wage to some unknown amount. Whether our minimum wage [escalation] clause was inserted in our proposal or not, the increase in minimum wage would directly affect our line item budget. The line item budget then would have to be amended to allow for the expanded costs if it was to represent a true picture of actual costs. Our reason for inserting the minimum wage clause in our response was to assure that Homemakers Upjohn would be in conformity with District of Columbia labor laws, if there were to be a change in the mandated rate. * * * Clearly, with or without the clause, the District of Columbia would need to renegotiate a rate to assure that wages for training and actual work were in conformity with its own mandates."

Our decision dealt with the differences between firm-fixed-price contracts and fixed price contracts with escalation provisions, stating that the former "provides for a firm price while the latter provides

for the upward or downward revision of the stated contract price upon the occurrence of certain contingencies which are specifically defined in the contract [such as an increased minimum wage rate]." We concluded, upon review of the RFP and its amendments, that offerors were required to provide a firm-fixed hourly rate. Thus, the upward revision of the DC minimum wage rates, or any other costs for that matter, was a risk the offerors were required to bear and which presumably would be reflected in the rates proposed. Consequently, although the contractor would be required to increase its wage rates as appropriate to conform to the "District of Columbia labor laws", there would be no basis under the contract to increase the rates payable to the contractor. We, therefore, find no basis to conclude that our decision was erroneous on the basis of the facts presented by Upjohn.

We have considered the other comments furnished by Upjohn and find they are not relevant to the issue upon which the original decision was based, and they do not change its result. Consequently, they need not be considered further.

Our original decision is affirmed.

2. RFP 77224-7

Prior to the date set for receipt of proposals under RFP 77224-7 (May 24, 1977), Upjohn was orally informed it could not compete for the award of a contract under that RFP (another solicitation for homemaker services) since it had been selected for award of a contract under RFP 1-F. DC had determined that it was in the District Government's best interests to have two contractors participate in the provision of homemaker services.

On May 18, 1977, Upjohn filed a protest with the Acting Director, Department of Human Resources, protesting its exclusion from participating in the second procurement, and complaining that neither RFP put

offerors on notice that they would be entitled to only one contract award.

On May 25, 1977, Upjohn submitted a proposal for RFP 77224-7 which was rejected as late. On June 16, 1977, the Acting Director in effect denied the protest. Upjohn took no further action after receipt of the denial of its protest until it received notice of our original decision early in October 1977.

Section 20.2(a) of our Bid Protest Procedures (4 C.F.R. 20.2(a)) provides in pertinent part that:

> "If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered* * *."

Since Upjohn clearly did not comply with that provision, the protest is untimely, and will not be considered on the merits.

This result is not so harsh as it would appear. Upjohn's actions seem to indicate that it would have been reasonably satisfied if it had received the award of the contract it had been led to believe it had won. As a practical matter, Upjohn has in fact been performing that contract under monthly extensions of its previous contract during these proceedings, and may continue to do so until a successor contract is awarded. Consequently, any possible prejudice to Upjohn which might have resulted from the circumstances of this case has, in our opinion, been substantially mitigated.

R.F. Keller

Deputy Comptroller General
of the United States