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DECISION



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

FILE: R-190870 DATE: May 17, 1978
MATTER OF: Bethesda Research Laboratories, Inc. -
Request for Reconsideration

DIGEST:

Prior decision holding that resolicitation was not required where competition was obtained and there was no prejudice to protester is affirmed, since it has not been shown that decision was based on errors of fact or law.

Bethesda Research Laboratories, Inc. (BRL), has requested reconsideration of our decision in Bethesda Research Laboratories, Inc., B-190870, April 24, 1978.

The decision held that, even if the oral solicitation of offers by the Veterans Administration (VA) was improper, resolicitation is not required, since competition was obtained and there was no prejudice to BRL.

BRL objects to the decision on the grounds that it in effect holds that procurement officials may violate with impunity the statutory mandate for written bids except where they act with a fraudulent or corrupt motive which would be difficult to prove. BRL states that the decision establishes a new policy which could have adverse ramifications in Government procurement.

First, let us make it clear that we did not intend our decision to condone or approve any improper action by the VA. Our Office has always advocated that every contracting agency, without exception, should abide by all statutory and regulatory requirements. However, we did not find it necessary to consider whether any

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impropriety occurred in this case, since, in any event, competition, which is the principal purpose of the procurement statutes and regulations, was achieved. The elements of competition were present and both offerors had an opportunity to compete on an equal basis. Moreover, the indications from the protester were that its prices would have been the same had the procurement been conducted on a formal basis and it did not object to the oral solicitation procedure until after it learned that the other offeror had submitted lower prices. Therefore, a resolicitation would merely turn the procurement into an auction and would be unfair to the innocent successful offeror whose prices had been disclosed. It is apparent that no one--the protester, the successful offeror or the Government--was harmed by the oral solicitation. There was equal competition and the prices to the Government would have been the same if the procurement was conducted in writing. In the circumstances of this case, assuring, of course, that the procurement was required to be conducted on a written basis, requiring a resolicitation would be placing undue emphasis on form over substance.

Second, the request for reconsideration is premised on the basis that all procurements are required to be in writing. However, to correct that understanding, there are circumstances when oral solicitations are appropriate. See Federal Procurement Regulations § 1-3.802(c) (1964 ed. amend. 118) for the civilian agencies of the Government and Armed Services Procurement Regulation § 3-501(d) (1966 ed.) for the military departments.

Third, we should point out that it is not necessary that the protester go so far as to prove corrupt or fraudulent conduct on the part of procurement officials in order to bring their actions into question. It would be sufficient to establish inadequate competition between the offerors--a condition not present in this case. Where lack of competition is alleged, the protester has the burden of affirmatively proving his case. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. In that regard, we have considered cases of procurements conducted on an oral basis where the protester disputed that competition was obtained

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and we have held that it has the burden of overcoming the contracting agency's record of the transaction. Wakmann Watch Company, Inc., B-187335, January 28, 1977, 77-1 CPD 72; Nationwide Building Maintenance, Inc., B-186602, December 9, 1976, 76-2 CPD 474.

Further, there is nothing new in the approach taken in the April 24 decision. See, particularly, Michael O'Connor, Inc., B-186654, October 18, 1976, 76-2 CPD 337, cited in the decision.

Finally, BRL has objected to the fact that we did not indicate in the decision that the Small Business Administration and the National Institutes of Health were in favor of resoliciting the procurement. However, that was not germane. Our decisions are based upon the recommendations of the agencies only to the extent they are supported by the facts and the law.

BRL has not established that our prior decision was erroneous in fact or law. Accordingly, the decision denying the protest is affirmed.


Deputy Comptroller General
of the United States