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**DECISION**



8105 Letter  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20540**

**FILE: B-192328**

**DATE: October 23, 1978**

**MATTER OF: Jones & Guerrero Co., Incorporated**

**DIGEST:**

1. Where determined by the contracting agency after the submittal of proposals that the most economical method of procuring the solicited items is by single award, it is appropriate to amend RFP to reflect that determination.
2. Neither possibility of a buy-in nor allegation of excessively low bid provides a basis upon which award of contract may be challenged.
3. Protest after award alleging contract should have been advertised rather than negotiated involves apparent solicitation impropriety and is therefore untimely, and does not raise a significant issue within the meaning of 4 C.F.R. § 20.2(c) (1977).
4. Allegation that award should have been made on basis of initial proposals is untimely, since the protest was not filed within 10 days after the basis for the protest was known or should have been known.

Jones & Guerrero Co., Inc. (J&G) through its counsel, protested to our Office by certified letter of June 27, 1978, concerning the proposed award of a contract for the supplying of filled milk and related products to Department of Defense installations on Guam to Foremost Foods, Inc. (Foremost) under request for proposals (RFP) No. F64133-78-R0008.

The RFP, issued April 14, 1978 by the Department of the Air Force, divided the requirements for milk and related milk products into four groups -- milk, milk

products, cheese and dips, and beverages. The date for receipt of initial offers was May 16, 1978.

As originally issued, the solicitation contained the standard provision for evaluation of bids for multiple awards prescribed by Armed Services Regulation (ASPR) 7-2003.23(b) (1976), which stated that in addition to other factors, bids would be evaluated on the basis of advantages and disadvantages to the Government which might result from making more than one award. For purposes of this evaluation, \$100 was assumed to be the administrative cost of each contract so awarded. "Individual awards will be for the items and combinations of items which result in the lowest aggregate price to the Government, including such administrative costs," the provision concluded.

A total of five amendments to the RFP were issued during the course of negotiations with J&G and Foremost; the first is not at issue here. The second, third, and fourth, among other things, increased quantities and extended dates for submission of revised proposals. Amendment 002, effective June 6, 1978, changed the multiple awards provision to read "Individual awards will be for the groups and/or combination of groups which will result in the lowest aggregate price \* \* ." (Emphasis added.) However, amendment 005, effective June 15, 1978, changed the basis of award, providing that "A single award shall be made to the offeror submitting the lowest aggregate total of four groups specified in the schedule;" best and final offers were required by 3 p.m. the following day.

J&G contends that this change was improper and unnecessarily restricted competition, and that the contracting officer abused his discretion and acted in bad faith, since he was aware that J&G lacked the ability to produce or otherwise economically provide all of the products covered by the RFP.

The Air Force contends that this challenge is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977), which provides that alleged improprieties which do not exist in an original solicitation but which are subsequently incorporated therein

must be protested not later than the next closing date for receipt of proposals. The Air Force alleges that J&G was notified of the amendment to the solicitation but failed to file either a written or oral protest prior to submittal of its best and final offer on June 16, 1978. J&G asserts that they did orally protest at the time of the notification of the amendment. Although it is unclear whether a timely protest on this issue was filed, we believe that the alleged impropriety warrants our consideration. See Industrial Maintenance Services, Inc., B-189303, B-189425, December 15, 1977, 77-2 CPD 466.

In cases involving formal advertising, our Office has held that an agency's determination that the Government's advantage lies in single, not multiple, awards is a proper exercise of administrative discretion, 49 Comp. Gen. 727, 733 (1970), which we will not question if there is any reasonable basis for that determination. B-158382, March 11, 1966. (We note, however, that the multiple awards provision in the protested solicitation is for use in procurement by formal advertising. See ASPR 2-201(a)D(iii).) In negotiated procurements, under some circumstances we also have upheld agency decisions to eliminate provisions for multiple awards by amending an RFP. See 51 Comp. Gen. 749 (1972); B-174803, July 13, 1972.

In the instant case, we think that the Air Force had a reasonable basis for amending the request for proposals to provide for a single award. After reviewing the initial and revised proposals, the contracting officer determined that a lower overall cost could be obtained if the contract for the four groups of milk and milk related products were awarded to a single offeror. An important consideration was the increased cost of distribution of the products if different companies were awarded the contract. In addition, the contracting officer took into consideration the "fixed" costs of overhead and general and administrative costs which are not proportionately variable and must be allocated over whatever volume is to be awarded. Based upon these factors, the Air Force decided that the most economical method of procuring the solicited items was by a single award. We believe it was appropriate to amend the RFP to reflect that determination.

Moreover, we fail to see how the modification of the RFP unduly restricted competition, as is alleged by J&G. The protester asserts that the amendment effectively eliminated J&G from consideration. Although J&G did not bid on all items in its initial proposal, it did so in its revised proposal, dated June 14, 1978. An examination of the best and final offers shows that although J&G was the low bidder on Group IV, which constituted 2% of the total items solicited, their aggregate price varied by only 4.9% from that of Foremost. Therefore, it is clear that J&G was competitive on an "all or none" basis and was not effectively eliminated from competition.

It should be noted that J&G does not allege that it was prejudiced by the short period of time (24 hours) that was provided to reconsider the proposals after the modification of the RFP to a single award. According to the Air Force, both J&G and Foremost agreed that they would be able to submit their best and final offers within the specified time. However, we suggest that the Air Force attempt to determine the advantage of requiring "all or none" bidding at an earlier stage of negotiations in future procurements. Most of the reasons cited by the contracting officer should have been apparent at the time of drafting the solicitation.

J&G also contends that Foremost is attempting to "buy-in" for the purpose of eliminating a potential competitor by offering an exceedingly low price. Our Office has consistently held that neither the possibility of a buy-in nor the allegation of an excessively low bid provides a basis upon which an award of a contract may be challenged, unless a determination of non-responsibility has been made. North American Signal Co. - Reconsideration, B-190972, August 4, 1978, 78-2 CPD //; Consolidated Elevator Company, B-190929, March 3, 1978, 78-1 CPD 166. Since the Air Force has found both offerors to be responsible, we will not object to award to Foremost on this basis.

J&G's remaining objections are untimely under our Bid Protest Procedures, 4 C.F.R. 20.2 (1977) and therefore will not be considered on the merits.

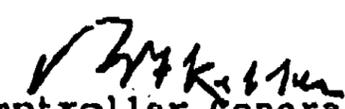
J&G contends that the contract should have been formally advertised rather than negotiated, because none of the exceptions to the requirement for advertising (ASPR § 3-200 et seq. (1976)) are applicable. Allegations concerning the method of procurement, i.e. advertising v. negotiation, must be made before bid opening or the closing date for receipt of initial proposals. See Technology Incorporated, B-190534, November 16, 1977, 77-2 CPD 379; Hayes International Corporation et al., B-179842, March 22, 1974, 74-1 CPD 141. J&G argues that they did orally protest the use of negotiation prior to May 16, 1978, but the Air Force states that J&G did not complain of the use of negotiation until after that date. Even assuming the validity of the oral protest to the contracting agency, any subsequent protest to our Office should have been filed within 10 working days of initial adverse agency action. The commencement of negotiations on June 2, 1978 was clearly "initial adverse agency action" to the protest on the use of negotiation as the procurement method. Since J&G failed to file a protest with our Office within 10 working days from that date, the protest is untimely.

Recognizing that its contention may be found untimely, J&G additionally contends that the issue is "significant" because of the adverse affect of discouraging future competition in Guam. An untimely protest may be considered if it raises " \* \* \* issues significant to procurement practices or procedures \* \* \*." We have held that where a protest involves issues which have been considered in prior decisions, such issues are not "significant." See The Public Research Institute of the Center for Naval Analyses of the University of Rochester, B-187639, August 15, 1977, 77-2 CPD 116. Negotiation versus advertising has been considered in many prior decisions of our Office involving a wide variety of factual situations. See R.C. Van Lines, Inc., B-190246, June 26, 1978, 78-1 CPD 462; B.B. Saxon Company, Inc., B-190505, June 1, 1978, 78-1 CPD 410; Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215. Therefore the same issue is not "significant" within the meaning of 20.2(c) of our Procedures, supra.

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J&G also alleges that the contracting officer should have awarded the contract to J&G based on its initial proposal. The protester bases this contention upon 10 U.S.C. 2304(g), which authorizes an award based on initial proposals where it can be clearly demonstrated that the acceptance of an initial proposal would result in fair and reasonable prices. The contracting officer and J&G representatives discussed this matter on June 2, 1978. J&G was informed at that time that an award would not be made based upon the initial proposals because of the changed needs of the Air Force; these were subsequently reflected in amendments to the RFP. In order to be timely, J&G's protest on this ground should have been filed by June 16, 1978, 10 working days after the basis for it was known.

Accordingly, J&G's protest regarding single award and the possibility of buy-in is denied, and the remainder is dismissed as untimely.

  
Deputy Comptroller General  
of the United States