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PK-11
Mr. Leven



DECISION

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

FILE: B-195012

DATE: February 7, 1980

MATTER OF: CEL-U-DEX Corporation

26-03857

ACC 378

DIGEST:

1. Contention that portion of agency report not be considered because contracting officer did not participate in its preparation is rejected as contracting officer read and approved report.
2. Award cannot be considered to have been made on initial proposal basis where agency issued amendment changing delivery schedule in RFP and providing all offerors opportunity to alter their proposals to conform to new requirement.
3. Agency may amend delivery schedule after submission of proposals to take advantage of particular offer so long as other offerors are given opportunity to respond to change.
4. Agency was not required to cancel RFP and issue IFB once it determined initial phase of delivery schedule could be extended where it had invested substantial time and effort in procuring items under RFP, where competition under RFP appeared to be adequate and where agency could reasonably assume readvertising might jeopardize its ability to obtain items as required.
5. Award made to low responsible offeror was in accordance with RFP which provided that award be made on basis of "price and other factors."
6. Allegations regarding award factors in RFP are untimely where filed subsequent to closing date for receipt of offers.
7. Protest of alleged infringement of patents is not for consideration since remedy for infringement rests in Court of Claims.

*Appointed
Sm. bus. contracts
Proposal evaluation refused
Evaluation criteria
Contract award
Contracting protests
Delivery terms
Procurement as above
protests*

[Protest Against Contract Award]

111512

008610

see last page

*situation
manipulates*

8. Labor surplus concern is not entitled to preference in procurement which was not labor surplus set-aside and where circumstances were such that concern was not entitled to special consideration.

ABC 378

CEL-U-DEX Corporation (CEL-U-DEX) ~~protests the~~ award of a contract to Fabco, Inc. (Fabco) under request for proposals (RFP) No. DLA 400-79-R-1882, issued by the Defense Logistics Agency (DLA). CEL-U-DEX maintains DLA utilized "improper contracting procedures" in making the award to Fabco. We find that the award to Fabco was proper. *DLA 23858*

The RFP was issued on March 29, 1979, as a small business set-aside for the purchase of 630,000 plastic card label holders for use in a warehouse mechanization project. The RFP required delivery of an initial quantity of 20,000 holders by May 4, 1979, and monthly delivery of 52,500 items ending with a final delivery of 32,500 items on or before May 4, 1980. The procurement was negotiated because DLA determined pursuant to 10 U.S.C. § 2304(a)(2)(1976) that the use of "Small Business Restricted Advertising" was not feasible or practicable since the card holders were urgently needed as delay would jeopardize the schedule of the project. *SLP*

Six offers were submitted by the April 16 closing date in response to the RFP; Fabco was low at a unit price of \$.026 while the protester was third low at a unit price of \$.100. Fabco, however, took exception to the delivery schedule, indicating that its offer was conditioned upon shipment of an initial quantity of 50,000 no earlier than August 31, 1979, and the remaining quantity within the succeeding 10 weeks or 50,000 per month.

DLA's purchasing agent telephoned a representative of Fabco to verify Fabco's offer of \$.026 per holder. Fabco's representative verified its offer and also indicated that Fabco was familiar with the RFP specifications and that it had a sample of a similar holder manufactured by CEL-U-DEX. Since delays had been experienced in the warehouse project, the contracting officer determined the schedule would permit the relaxation of

the initial delivery dates so that DLA could take advantage of Fabco's price.

Thus, on April 27, DLA issued an amendment to the RFP providing for delivery of an initial quantity of 150,000 by September 31, 1979 [sic], and for periodic delivery of the remaining quantity by December 31, 1979. The amendment also "extended" the closing date of the RFP to May 10. The amendment was sent to all six offerors.

Subsequently, four of the six offerors, including Fabco and CEL-U-DEX, acknowledged receipt of the amendment but did not otherwise modify their proposals. Fabco further indicated that its offer was contingent upon award being made by May 17. On May 16, DLA made an award to Fabco as the low offeror.

In general, CEL-U-DEX maintains that the award to Fabco is improper because DLA negotiated only with that firm in order to take advantage of Fabco's low but unacceptable offer. The protester also objects, among other things, to the agency's awarding the contract to Fabco solely on the basis of its low price and questions the propriety of portions of DLA's report to this Office on the protest.

It is the protester's view that our Office should reject those portions of the DLA report which concern the contracting officer's actions because he did not participate in preparing the report. Since the contracting officer -- who was on vacation when the report was written -- indicates that he has read the report and approves of its contents we see no merit in the protester's allegation.

DLA denies that it negotiated solely with Fabco after receipt of proposals and maintains award was made on the basis of initial proposals. The agency argues that under Defense Acquisition Regulation (DAR) § 3-805.5(d)(1976 ed.) its verification of Fabco's offer

did not constitute discussions. DLA contends it properly determined that the Government stood to benefit by postponing initial delivery dates and that no offeror was prejudiced by this decision since all offerors were sent a copy of the amendment.

We do not agree with DLA that award was made on the basis of initial proposals without written or oral discussions, nor do we agree with CEL-U-DEX that DLA improperly held discussions solely with Fabco.

We have held that the test of whether discussions have occurred is whether an offeror has been afforded an opportunity to revise or modify its proposal. 51 Comp. Gen. 479, 481 (1972). By issuing an amendment changing the RFP's delivery schedule subsequent to the closing date for receipt of initial proposals, DLA afforded each offeror the opportunity to change its proposal to conform to DLA's new requirements and such action constituted discussions with all offerors. James R. Parks Co., B-186031, June 16, 1976, 76-1 CPD 384. The fact that DLA telephonically requested that Fabco verify its price and discussed the essential specification requirements without holding similar discussions with other offerors is not significant as we are aware of no rule requiring that the same matters be discussed with each offeror. Science Management Corporation, B-193256, April 5, 1979, 79-1 CPD 237; RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99. Here the contracting officer had no reason to seek verification of CEL-U-DEX's price or to discuss specification requirements with the firm which has manufactured the item for a number of years.

Although the RFP amendment failed to specifically request offerors to submit their "best and final" offers as required by DAR § 3-805.3(d), the amendment indicated that the "CLOSING OF THE RFP" was extended to "2:00 P.M. LOCAL TIME WHERE PROPOSALS ARE RECEIVED 79 MAY 10." We believe that this language was sufficient to place offerors on notice that revised offers (best and final) should be submitted. See James R. Parks, supra.

The protester also objects to DLA's amending the RFP in order to consider Fabco's low offer. In this regard, CEL-U-DEX insists that since a DLA internal form requesting that an amendment to the RFP be issued was dated April 20, after discussions with Fabco but before DLA determined that the warehouse project had been delayed, doubt is cast on the propriety of the agency's actions.

An agency may amend the delivery schedule after the submission of proposals to take advantage of terms being offered by a particular offeror so long as the other offerors are given the opportunity to respond to the change. See Alton Iron Works, Inc., B-179212, March 6, 1974, 74-1 CPD 121. We have also recognized that an agency may amend an RFP after submission of proposals to effect the most economical method of procuring the solicited items. Jones & Guerrero, Co., Incorporated, B-192328, October 23, 1978, 78-2 CPD 296. Thus, the fact that DLA contracting personnel may have considered amending the solicitation before they knew that agency needs would so permit has no legal significance.

The protester also complains that the "lengthening out" of the delivery schedule was inconsistent with the agency's stated justification for using conventional negotiation procedures and that the RFP should have been canceled and the procurement conducted by means of the restricted small business advertising procedure.

We do not agree. Although the record indicates DLA might have been able to take such a course of action, we do not believe it was required to do so after investing a substantial amount of time and effort in procuring the items under the RFP and in view of the fact that initial competition appeared to be adequate. Furthermore, we believe DLA could reasonably assume that canceling the RFP and readvertising might jeopardize its ability to obtain the items as required. Nevertheless, we believe the extension of the initial phase of the delivery schedule approximately one month after the RFP was

issued raises doubt as to whether the decision to use conventional negotiation procedures was based on current and accurate information, and we are bringing this matter to the attention of the Director, DLA.

CEL-U-DEX states that it was improper to award the contract to Fabco solely on the basis of its low price because the solicitation provided that award would be made on the basis of "price and other factors." In this connection, the protester maintains that it was arbitrary for the agency to "disregard entirely CEL-U-DEX's experience and Fabco's total lack of it and to rely on price alone."

We have held that the term "other factors" includes matters which are implicitly considered in any procurement such as an offeror's responsibility and any factor prescribed by law, regulation or public interest. Joseph Legat Architects, B-190888, March 16, 1978, 78-1 CPD 214. It does not permit award to be based on factors which were not contained in the RFP and which offerors were not adequately apprised of. Since the record indicates that the agency found Fabco to be responsible and its final proposal to be acceptable, it is clear that award to the low priced offeror was in accordance with the RFP terms.

The protester also seems to be complaining that the solicitation should have included more extensive evaluation criteria. Such complaints which were made after the opening date for receipt of initial proposals are untimely under our Bid Protest Procedures. 4 C.F.R. § 20.2(b)(1) (1979).

Finally, the protester argues that the agency should have determined whether Fabco would violate CEL-U-DEX's patent on the item and insists that it should have been given special consideration for being located in a labor surplus area.

We do not consider allegations regarding alleged patent infringement, as the remedy for such violations rests in the Court of Claims. Miltope Corporation, B-191322, July 7, 1978, 78-2 CPD 20. Also, since the procurement was not set aside for labor surplus area concerns and since there is nothing in the solicitation that entitles a labor surplus area firm to special consideration under the circumstances here, the agency properly did not consider the protester's labor surplus status in making the award.

The protest is denied.

A handwritten signature in cursive script that reads "Milton J. Aoula".

For The Comptroller General
of the United States



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

B-195012

February 7, 1980

*Discrepancy
excepted
DLA as
very concerned*

Lt. General Gerald Post, USAF
Director, Defense Logistics Agency

Dear General Post:

Enclosed is a copy of our decision of today denying the protest of CEL-U-DEX Corporation concerning a contract awarded under RFP No. DLA 400-79-R-1882. The procurement was set aside for small businesses and conducted under conventional negotiation procedures because your agency determined the use of "Small Business Restricted Advertising" procedures was not feasible or practicable since the items being purchased were urgently needed.

Approximately one month after the RFP was issued, the initial phase of the delivery schedule was extended. This suggests that the decision to use conventional negotiation rather than "Small Business Restricted Advertising" was not based on current and accurate information. We therefore recommend that steps be taken to assure that procurement decisions of this nature are based on current and accurate information.

We also point out that the amendment to the RFP failed to specifically request offerors to submit their "best and final" offers as required by Defense Acquisition Regulation (DAR) § 3-805.3(d). Although this failure does not appear to have prejudiced the offerors since the circumstances surrounding the amendment placed them on notice that they should submit their "best and final" offers, we believe future compliance with DAR § 3-805.3(d) is in order to prevent any possible prejudice to offerors.

Sincerely yours,

For The Comptroller General
of the United States

Enclosure