

DECISION



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

FILE: B-201618

DATE: April 22, 1981

MATTER OF: Plant Facilities and Engineering, Inc.

DLG06569

DIGEST:

1. [Protest against alleged solicitation improprieties] which were apparent prior to closing date for initial proposals is untimely under 4 C.F.R. § 20.2(b)(1) (1980); allegation that contract specialist arbitrarily dismissed question about meaning of solicitation is also untimely filed since protest was filed more than 10 days after question was dismissed. See 4 C.F.R. § 20.2(b)(2) (1980).
2. Protester's summary allegations that it was told awardee was assured of contract award before procurement had been completed and that Army had refused offer to negotiate are not supported by record.
3. Where only evidence in record is protester's assertion--denied by agency--that it made oral modification of its offer, protester has failed to satisfy its burden of affirmatively proving case. In any event, oral modification was not permitted by terms of solicitation.
4. Procuring agency's failure to comply with regulations for proceeding with award notwithstanding pending protest is procedural defect and does not affect validity of award.

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Plant Facilities and Engineering, Inc. (Plant), protests the award of a contract to Berwick Forge & Fabricating Co. (Berwick) under solicitation No. DAAA09-80-R-0168 issued by the U.S. Army Armament Readiness Command, Rock Island, Illinois, for storage and maintenance of equipment. The company asserts that the solicitation was defective and that there were other irregularities in the procurement. Based on our review of the record, the protest is dismissed in part and denied in part.

Solicitation Defects

Plant asserts that certain "integral items" were left out of the solicitation and appears to complain that the procurement was not set aside for small business. Plant also asserts that the solicitation's "Mobilization Base Producer" requirement was deleted only to allow Berwick to qualify as an offeror.

Plant's objections to the solicitation should have been made the subject of a protest prior to the closing date (October 31, 1980) for receipt of initial proposals. Specifically, section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), provides that protests against alleged improprieties in a solicitation are to be filed prior to the closing date for the receipt of initial proposals where, as here, those alleged improprieties are apparent prior to the closing date. Since Plant's protest on these grounds was not made until after the closing date, it is untimely filed and will not be considered.

Government Employees' Misleading Conduct

Plant contends it was deliberately misled by the "contracting officers," who allegedly dismissed its questions about the terms of the solicitation as trivial. Specifically, Plant states that a contract specialist brushed aside a question as to whether the solicitation contemplated continued Government occupancy of certain facilities, which, if not required, could have resulted in a substantial savings to Plant,

the incumbent contractor. In response, the contract specialist has replied, as follows:

"* * * I recall only one conversation with a party who identified himself as Mr. Dabbs of the Protestor. This conversation took place sometime in the middle, or toward the end of November, 1980. I informed Mr. Dabbs the Government's requirements were spelled out in the Scope of Work in the Solicitation. * * *"

Since the alleged arbitrary dismissal of its question took place in November 1980, we consider this part of the protest to be untimely under section § 20.2(b)(2) of our Bid Protest Procedures, above. Specifically, the cited section requires that protests involving issues other than solicitation defects are to be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. Plant's protest was filed with our Office on December 24, 1980, or more than 10 days after the basis of protest was known in November 1980. Therefore, we will not consider this part of the protest.

Improper Statement and Refusal to Negotiate

Plant alleges that its employees were told well before the contract was awarded that Berwick was assured of the contract. The Army denies that the statements, if made, originated with its personnel. The protester also asserts that the Army refused Plant's December 19 verbal offer, after submission of best and final offers, to negotiate; the Army denies that an offer was made. Based on our review of the record, we must conclude that there is no support in the record for these allegations beyond Plant's summary statements. In this regard, we point out that a protester has the burden of affirmatively proving its case (Kramer Associates, Inc., B-197178, July 16, 1980, 80-2 CPD 33); however, Plant's unsupported allegations do not meet this burden.

Oral Price Reduction

Plant submitted a best and final offer of \$201,539.99 on December 16. Plant alleges that its chairman then telephoned the contracting officer on December 17 and advised him to reduce Plant's offer by \$10,000. Such a reduction would have made Plant's offer lower than Berwick's offer of \$195,750. The contracting officer denies that any oral modification was made to him. Given these conflicting positions, we must conclude that the protester has failed to carry the burden of affirmatively proving its case.

Even if the allegation was supported by the record, however, oral modification of the offer was not permitted by the terms of standard form 33A (January 1978), incorporated into the solicitation, which specifies, at paragraph 8(b), that modification of offers may be made by mail or telegram only; moreover, paragraph 8(c) of this standard form expressly provides that a modification resulting from a request for best and final offers received after the time and date specified in the request will not be considered unless permitted under the late proposal rules. Therefore, there was no reasonable basis for the protester to have expected that negotiations would be conducted after December 16.

Award Notwithstanding Protest

Plant contends that the contract was awarded to Berwick after the contracting officer had notice of the protest and without compliance with the requirements of Defense Acquisition Regulation § 2-407.8(b)(2) and (3) (1976 ed.). Even if award was made after notice of the protest had been received, the validity of the award is not thereby affected (New Haven Ambulance Service, Inc., 57 Comp. Gen. 361 (1978), 78-1 CPD 225); moreover, the award was not prejudicial since the protest otherwise lacks merit.

Award Based on Inferior Experience

Finally, Plant suggests that award should have been made to it at a slightly higher price in recognition of its allegedly superior experience. However, the contracting officer found Berwick's offer to be acceptable and the company to be responsible; therefore, award had to be made to Berwick in accordance with the award provision of the RFP which mandated award to the "lowest, responsive, responsible offeror whose proposal is rated acceptable."

Protest denied.

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

Acting Comptroller General
of the United States