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DECISION



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

FILE: B-198534; B-198534.2; DATE: June 9, 1981
B-198534.4

MATTER OF:

Flight Systems, Inc.; Flight Technology Corp.;
Thunderbird Aviation, Inc.

DIGEST:

1. Protest against award to firm that was not small business concern has been rendered academic by termination of contract.
2. Protest against small business set-aside and alleged restrictive nature of procurement has been rendered academic by subsequent cancellation of procurement.
3. Determination to cancel procurement for manned aircraft to tow targets and to utilize drones instead is reasonable in view of contracting agency's ultimate determination that more realism has been added to crew training by permitting firing directly at drones.
4. Failure of installation mailroom to deliver, before closing time for receipt of proposals, proposal received by Express Mail half hour before closing time cannot be considered to be due "solely" to mishandling by Government after receipt at Government installation, since there was nothing on face of envelope indicating it contained a proposal or had to be delivered to the addressee by a specific time.
5. Although protester may have been prejudiced by award to contractor based on aircraft that RFP amendment indicated was unacceptable, there is no assurance that protester

[Procurement Procedures Protest]

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would have been successful offeror if RFP had been amended to advise offerors of acceptability of aircraft and claim for proposal preparation costs is therefore denied.

6. Claim by next low offeror for proposal preparation costs based upon award being made to other than small business concern on small business set-aside is denied, since award was not arbitrary or capricious in that contractor represented in proposal that it was small business and, although SBA representative had expressed doubts to contracting officer about correctness of representation before award, contracting officer did not have formal SBA size status determination when award was made and considered circumstances so urgent that award had to be made at once.

Flight Systems, Inc. (FSI), Flight Technology Corp. (FTC), and Thunderbird Aviation, Inc. (TAI), protest the conduct of a procurement of Manned Aircraft Tow Target (MATT) services under request for proposals (RFP) No. DAAH01-80-R-0031 issued by the United States Army Missile Command, Redstone Arsenal, Alabama, and the Army's subsequent decision to cancel the procurement following default by the contractor. FTC and TAI also assert claims for proposal preparation and other associated costs.

FSI protests against the small business set-aside of the procurement. FTC and TAI protest the restrictive nature of the specifications, the award to a firm that was not a small business, and the subsequent determination by the Army to utilize drones under another contract instead of manned aircraft. FTC also protests the Army's decision to reject as late its proposal under the RFP.

We conclude that the protests are academic in part, without merit in part and deny the claims for proposal preparation and associated costs.

The FTC and TAI protest against an award to a firm that was not a small business concern has been rendered academic by the termination of the contract. The FSI protest against the small business set-aside and the FTC and TAI protests against the alleged restrictive nature of the procurement has been rendered academic by the subsequent cancellation of the procurement. Although FTC and TAI protest the cancellation, we find that there was a reasonable basis for the action. After the Army terminated the contract, it was left with a need for target services. Taking into consideration the relative costs of obtaining drone services as opposed to manned aircraft services and the shorter time it would take to obtain drone services, the Army decided to obtain drone services through the amendment of a contract with Beech Aerospace Services, Inc. While FTC and TAI dispute the decision on the basis that it would have been more cost effective to continue to use manned aircraft and that the Air National Guard could have been utilized until a contractual commitment was made for the manned aircraft, the Army has now advised that it prefers the use of drones because more realism has been added to the crew training by permitting firing directly at the drones. We will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. Easy Bay Auto Supply, Inc., B-195325, October 23, 1979, 79-2 CPD 281. We find the Army's determination to utilize drones because of the added realism created by their use to be a reasonable basis.

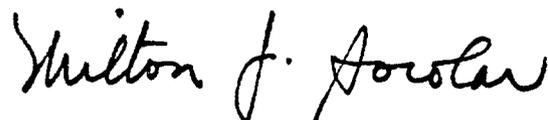
The FTC protest against the rejection of its late proposal is denied. FTC contends that the proposal was late because the Army mishandled it after arrival at the arsenal. Although the proposal was received by Express Mail in the installation mailroom a half hour before the scheduled closing time for the receipt of proposals, the wrapper on the proposal bore no exterior indicia disclosing that it contained a proposal or that it had to be delivered to the addressee by a specific time. Therefore, the failure of the mailroom to deliver the proposal to the office designated on the envelope before the closing time cannot be considered to be due "solely" to mishandling by the Government after receipt at the Government installation.

See Defense Acquisition Regulation (DAR) § 7-2002.4(a)(ii) (1976 ed.). FTC's claim for proposal preparation costs, lost profits and legal expenses also is denied, since the failure to have its proposal considered is attributable to its own action.

There remains for consideration whether TAI is entitled to proposal preparation costs because of the award made to the contractor. TAI indicates that it was led to believe by answers to questions contained in an amendment to the RFP that Canadair T-33 aircraft would not be acceptable under the contract only to discover that the award made to the contractor was based upon the use of the Canadair T-33 aircraft. However, while TAI may have been prejudiced in that regard, the correct procedure would have been to amend the RFP to advise the offerors of the acceptability of the Canadair T-33. Ket, Inc.--Request for Reconsideration, B-190983, January 12, 1981, 81-1 CPD 17. If that were done, there is no assurance that TAI would have been the successful offeror. Proposal preparation costs are denied where it is conjectural whether the claimant would have received the award. Prototype Development Associates, Inc.--Reconsideration, B-193595, September 22, 1980, 80-2 CPD 214.

TAI also claims proposal preparation costs because it was the next low offeror on the small business set-aside and the award should have been made to it instead of the contractor since the contractor was not a small business concern. However, the contractor represented in its proposal that it was a small business concern and, although a Small Business Administration (SBA) representative had expressed doubts to the contracting officer about the correctness of the representation before the award was made, the contracting officer did not have a formal small business size status determination from the SBA when the award was made and he considered the circumstances so urgent that he decided to make an award without providing a notice of his intention to the other offerors and prior to any formal decision from the SBA. Although the SBA ultimately decided that the contractor was not a small business concern and the contracting officer terminated the contract for

default because the contractor was unable to furnish the certification required for the Canadair T-33 aircraft, we do not find that the award to the contractor was arbitrary or capricious in the circumstances so as to entitle TAI to bid preparation costs. R&E Cablevision, B-199592, February 19, 1981, 81-1 CPD 110.

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

Acting Comptroller General
of the United States