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DECISION



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

FILE: B-209785

DATE: January 24, 1983

MATTER OF: Freund Precision, Inc.

DIGEST:

Factors which may be evaluated where award is based on "price and other factors" are those prescribed by law, regulation or settled procurement practice. Agency acts properly by refusing to give protester credit for its effort to develop acceptable alternative to product previously available only from sole source.

Freund Precision, Inc. protests the selection of ACR Electronics, Inc. to furnish flash guard assemblies under Defense Logistics Agency Request for Proposals (RFP) DLA400-82-R-4852. Freund says that in the past similar flash guard assemblies were procured non-competitively from ACR. Freund states that it developed a competing assembly at its own expense and that it should have been awarded the contract to encourage firms such as itself to develop competitive products. Moreover, it contends it was promised the contract by an employee of DLA during negotiations and insists that ACR must have been given inside information by someone within DLA because ACR lowered its price significantly in its best and final offer, allowing it to quote a unit price \$3.95 or \$0.15 less than Freund's unit price of \$4.10.

First, concerning Freund's belief that its efforts in developing an acceptable alternative product should have been rewarded by a contract, we point out that the award of any Government contract must be made in accord with the evaluation criteria set out in an RFP. Grey Advertising, Inc., 55 Comp. Gen. 1111, 1123 (1976), 76-1 CPD 325. Here, the RFP indicates that the Government would consider for award any product which accompanying descriptive data showed to be an acceptable substitute for the ACR product, which was identified by part number. Selection was to be

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based on "price and other factors." Freund's product was found to be acceptable, subject to first article testing, but was not low in price. As the Navy points out, the phrase "price and other factors" has been held by our Office to include in addition to price only those factors which are implicitly considered in any solicitation or which are required to be considered by law, regulation or settled procurement practice. CEL-U-DEX Corporation, B-195012, February 7, 1980, 80-1 CPD 102. Since there is no legal requirement or settled practice requiring an agency to reward an offeror's efforts to develop alternative products, this portion of Freund's protest is without merit.

Next, there is no evidence to support Freund's allegation that ACR was improperly furnished information causing it to lower its price in its best and final offer. Freund argues that wrongdoing must be inferred from the timing and magnitude of ACR's price reduction (approximately 20 percent in its best and final offer). However, the time (3 months) required to review the acceptability of Freund's part would have suggested to others the possibility that competition existed, and significant price reductions in a firm's best and final offer are common when a firm suspects it has competition. Bell Aerospace Co., 55 Comp. Gen. 244, 251 (1975), 75-2 CPD 168. Freund also lowered its price, albeit by a smaller amount. In our view, Freund has not met its burden of proving its case, FMI-Hammer Joint Venture, B-206665, August 20, 1982, 82-2 CPD 160, and this basis of protest is denied.

Finally, we consider Freund's contention that it was promised a contract during discussions.

It is clear that by the time discussions were conducted, DLA was willing to consider Freund's product acceptable provided Freund would agree to first article testing. This was discussed with Freund. However, the fact that Freund's part was acceptable could not assure that Freund would receive an award which was to be based on price. DLA denies it made any promise, but even if it had, such a promise could have no binding effect because DLA was legally obligated, having conducted discussions, to solicit best and final offers before selecting an awardee, Defense Acquisition Regulation (DAR) § 3-805.3(d)(1976 ed.), and to award on the basis of price.

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The protest is denied.

Milton J. Jordan
for Comptroller General
of the United States