

DECISION

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

FILE: B-213978

DATE: May 22, 1984

MATTER OF: Printer Systems Corporation

DIGEST:

1. When the only evidence on an issue of fact is a protester's statement that conflicts with that of contracting officials, the protester has not carried its burden of proof.
2. When, after submission of best and final offers, information is requested for the purpose of eliminating a minor uncertainty or irregularity, rather than for determining whether proposals are acceptable, and offerors are not permitted to change their proposals, clarification rather than discussion has occurred, and new best and final offers are not required.
3. GAO Bid Protest Procedures require alleged deficiencies that are apparent on the face of an amendment to be protested before the next closing date and other alleged improprieties to be protested within 10 working days after the basis for protest is known or should have been known. Protest that does not meet these criteria will be dismissed as untimely.
4. Award of a contract notwithstanding notice of a protest is a procedural deficiency that does not affect the validity of an award.

Printer Systems Corporation protests allegedly improper actions by the Internal Revenue Service in amending a solicitation and discussing proposals for the lease or purchase and maintenance of 2,000 data communication terminals. We deny the protest in part and dismiss the remainder.

The solicitation in question, No. 83-315, issued July 22, 1983, was amended four times between that date and December 5, 1983. Award was made to Sperry UNIVAC, the low evaluated offeror, on December 29, 1983.

The gist of Printer Systems' protest is that it was not treated fairly and equally. The firm alleges that between November 17, the due date for the first round of best and final offers, and December 7, when offerors were required to submit revised cost tables, the IRS improperly advised Sperry that it was not the low evaluated offeror. In addition, Printer Systems alleges that changes made through the amendments were based not on agency needs, but rather on the desire to give Sperry opportunities to lower its prices, and thus constituted an auction.

Printer Systems notes that by letter dated November 22, IRS advised Sperry that certain exceptions contained in its proposal must be withdrawn or it could not be considered for award. Since the closing date for negotiations (as stated in the letter) was 1 day earlier, November 21, Printer Systems argues that this letter evidences the fact that IRS improperly continued negotiations with Sperry, and that it "should also have been afforded the opportunity to continue negotiating."

Printer Systems further contends that while it was prohibited from changing its prices in responding to Amendment No. 4, Sperry was not similarly precluded from changing its prices. By requesting revised cost tables, Printer Systems argues, IRS was reopening negotiations and should have allowed all offerors to revise their proposals.

We find no support in the record for any of these allegations. The IRS denies that it either advised Sperry of its competitive position or amended the solicitation in order to give Sperry an opportunity to lower its prices. The November 22 letter, which specifically stated that the second round of best and final offers was due on November 21, was merely a written confirmation of an earlier, oral request for those offers, the agency asserts, and no further discussions were conducted.

Following receipt of those offers, according to IRS, the contracting officer discovered a typographical

error in the delivery schedule that caused slight discrepancies in the way system life costs were calculated. Consequently, on December 5 IRS issued Amendment No. 4, clarifying but not changing delivery schedules and requiring offerors to revise their summary cost tables. No one was allowed to change unit prices, and the relative standing of offerors did not change as a result of the revisions, the agency adds; in fact, Sperry did not change its prices at any time after submission of first best and final offers on November 17. IRS concludes that Amendment No. 4 was merely a request for clarification, not requiring or permitting a third round of best and final offers.

It is well established that the protester has the burden of proving its case. International Alliance of Sports Officials, B-211755, Jan. 25, 1984, 84-1 CPD ¶ 117. Printer Systems' allegations that Sperry was improperly advised that it was not the low offeror and that amendments were made in order to permit Sperry to better its competitive position are made "on information and belief." In addition, IRS has denied that it conducted negotiations after the November 21 cut-off date. When the only evidence on an issue of fact is a protester's statement that conflicts with that of contracting officials, the protester has not carried its burden of proof. Dictaphone Corp., B-210692, June 27, 1983, 83-2 CPD ¶ 26. Such is the case here.

As for the request for revised cost tables, we believe IRS has correctly characterized it as a request for clarification from all offerors, since its purpose appears to have been to eliminate a minor uncertainty or irregularity. Offerors were not permitted to change their unit prices or other aspects of their proposals, and the information provided was not used to determine whether proposals were acceptable. See Alchemy, Inc., B-207338, June 8, 1983, 83-1 CPD ¶ 621 and cases cited therein. Therefore, IRS was not required to allow submission of new best and final offers.

Since we cannot conclude that Printer Systems was treated unfairly or that Sperry received preferential treatment, we deny the protest on these grounds.

Printer Systems also protests the IRS's failure, in several instances, to reduce oral advice regarding the

procurement to writing, as required by the Federal Procurement Regulations, 41 C.F.R. § 1-3.805-1(d) (1983). For example, on November 15, when Printer Systems questioned the fact that Amendment No. 3 listed 24 installation dates for 23 sites, IRS orally advised it that two different sites should have the same installation date. On November 18, orally requesting a second round of best and final offers, IRS also requested prices for an optional quantity of 2,000 terminals, and on December 6, in a telephone conversation about Amendment No. 4, IRS apparently instructed Printer Systems to insert a line in the delivery schedule to cover a missing item.

We find this portion of the protest untimely. Our Bid Protest Procedures require alleged deficiencies that are apparent on the face of an amendment to be protested before the next closing date and other alleged improprieties to be protested within 10 working days after the basis for protest is known or should have been known. See 4 C.F.R. § 21.2 (1984). While we do not necessarily agree that the above changes were so substantial as to require issuance of a formal amendment, in the case of the missing date in Amendment No. 3, issued November 4, IRS's failure to issue a further amendment correcting this omission should have been protested by November 17, the due date in the first round of best and final offers, as specified in that amendment, and the missing item in the delivery schedule in Amendment No. 4 should have been protested by December 7, the date for submission of revised cost tables.

Printer Systems' protest was not filed until December 20. We therefore dismiss this portion of the protest, noting that since the firm had actual notice of the changes that it argues it should have been reduced to writing, a protest on this basis is in any case without merit. See Southland Associates, 62 Comp. Gen. 50 (1982), 82-2 CPD ¶ 451.

Finally, Printer Systems challenges the contracting officer's statement that the contract was awarded to Sperry before IRS became aware of the protest. Assuming, for argument's sake, that the contracting officer did award the contract with notice of the protest, this would be a procedural deficiency that does not affect the validity of the award. See Martin Tool and Die, Incorporated, B-208796, Jan. 19, 1983, 83-1 CPD ¶ 70.

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The protest is dismissed in part and denied in part.

for *Milton J. Fowler*
Comptroller General
of the United States