

DECISION

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

28494

FILE: B-212557

DATE: June 11, 1984

MATTER OF: Andee Boiler & Welding Company

DIGEST:

1. Immediate rejection of protester's proposal and award to remaining, acceptable offeror was justified where procurement was conducted on an expedited basis to meet an urgent need and protester stated unequivocally during oral discussions that it could not meet mandatory delivery schedule. Fact that award was completed within minutes does not demonstrate that protester, who later attempted to change his position regarding delivery, was treated unfairly.
2. Allegation that agency's actions were dictated by bias is without merit as improper motives are not attributed on the basis of inference or supposition, agency's actions were consistent with its need to act expeditiously to meet an urgent requirement, and there is no evidence to support alleged bias.

Andee Boiler & Welding Co. protests award of a contract to Independent Mechanical Contractors, Inc. under Veterans Administration (VA) solicitation 578-82-83 for emergency repair (retubing) of boilers at the VA Hospital, Hines, Illinois. The procurement was conducted on an expedited basis after two of four boilers at Hines failed during the evening of July 10, 1983. We deny the protest.

The solicitation was issued on July 20 as a formally advertised small business set-aside, with bids due the next day. On July 21, after the receipt of offers, VA issued an amendment deleting the set-aside restriction

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and changing the procurement to a negotiated one under the public exigency exception to the requirement for formal advertising. See Federal Procurement Regulations (FPR), 41 C.F.R. § 1-3.202 (1983). It also conducted telephone discussions, during which Andee advised VA that it would not be able to comply with the mandatory delivery schedule. Award was then made to Independent, the only other offeror.

Andee believes that it was not treated fairly in that VA personnel acted in concert with Independent to deliberately deny it a contract which it should have received. Specifically, Andee complains that: (1) it was not solicited; (2) it received a copy of the solicitation only because it specifically asked for one; (3) the time for closing on July 21 was moved up to make competing more difficult; (4) no public bid opening was conducted; and (5) Independent is not a small business and the solicitation was amended after closing to remove the small business set-aside restriction so that Independent could compete. In Andee's view, VA should have awarded the contract to it and saved \$80,000--the difference between Andee's and Independent's bids.

It is undisputed that Andee initially did advise VA that it could not meet the delivery schedule. The record shows that VA called Andee at 2:50 p.m. on July 21 to advise that it was dropping the set-aside restriction. During the ensuing conversation, Andee informed VA that its subcontractor required 4 weeks to obtain necessary material, that a 6-week completion schedule, rather than the required 4-week schedule for one of the boilers, would be more realistic, and that "in no way could anyone complete the job" in 30 days. The contracting officer reports that when he contacted Independent, following the call to Andee, that company confirmed that it could complete work on one boiler within 30 days. He says he then hand-carried the necessary paperwork to get funds obligated for the contract at Independent's price, and awarded the contract to Independent. The contracting officer reports that upon returning to his office, he received a call from Andee who advised him that it had checked again with its subcontractor, that it had been mistaken, and that the 30-day requirement could be met.

The contracting officer advised Andee that award had been made.

We think the agency acted reasonably here. The law recognizes that at times the government may have to conduct procurements that involve exigent circumstances. See 41 U.S.C. § 252(c)(2); FPR, 41 C.F.R. § 1-3.202. We have also held that where time constraints prevent preparation of definitive specifications, designs, and drawings or the conduct of a regular competition, urgency may justify an expedited negotiated procurement with as complete a statement of requirements as practical submitted to each competitor, shortened response times, telegraphic or oral offers and negotiations, and such other short-cuts as may be reasonably necessary under the circumstances. Las Vegas Communications, Inc.--Reconsideration, B-195966.2, Oct. 28, 1980, 80-2 CPD ¶ 323. An agency's obligation in such cases, we stated, is "to treat each competitor as fairly as the circumstances will permit."

On the record before us, we fail to see how Andee was treated unfairly. Although Andee complains that it was not formally solicited, it admits it received a copy of the solicitation in sufficient time to prepare and submit its proposal. The record does not support Andee's assertion that the scheduled time for closing was changed to inconvenience it, as Andee suggests; and Andee, which was notified of the change, obviously suffered no prejudice. Further, the fact that the VA did not publicly open offers is not objectionable since bids are publicly opened only in advertised procurements and this procurement ultimately was treated as negotiated rather than an advertised one.

The record also indicates that VA had reason to believe that both Andee and Independent were not small businesses, and that the set-aside restriction was removed to enable both firms to compete, rather than to benefit Independent only.

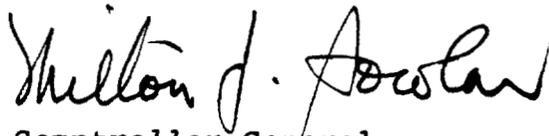
As to VA's rejection of Andee's proposal and the award to another company after Andee told VA it could not meet the mandatory 30-day delivery schedule, we note that

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the agency was faced with the need to make an immediate award and to have the boiler repairs completed as soon as possible. When Andee indicated that it could not meet the 30-day completion requirement for one of the boilers, the contracting officer checked with Independent, the only other offeror, and received assurances that Independent could meet that schedule. Under the exigent circumstances, we see nothing improper in the immediate award to Independent, even though Independent's price was higher than Andee's. Although Andee views VA's action in completing award as having been taken precipitously (evidenced by the fact that award was made before Andee's call, 5 to 10 minutes later, reversing its position), we think VA's action was consistent with the known urgency of the procurement.

Although Andee maintains that VA's actions, taken together, demonstrate that VA was prejudiced against Andee, we point out that the burden of affirmatively establishing bias in a bid protest is borne by the protester; improper motives will not be attributed to individuals on the basis of inference or supposition. Alan-Craig, Inc., B-202432, Sept. 29, 1981, 81-2 CPD ¶ 263. That burden has not been met here. On the record before us, as discussed above, we think VA's actions were reasonable in view of the necessity of dealing with an urgent need. While the procurement--with the quick changes from formal advertising to negotiation and small business set-aside to unrestricted and the failure to initially solicit Andee--was not handled as well as it might have been, we see no evidence that VA's actions were motivated by bias against Andee.

The protest is denied.

for 
Comptroller General
of the United States