

DECISION

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

FILE: B-215018

DATE: September 25, 1984

MATTER OF: American International Rent A Car

DIGEST:

1. GAO will not review a contracting officer's affirmative determination of responsibility absent a showing that the contracting officer acted fraudulently or in bad faith or that definitive responsibility criteria in the solicitation have not been met.
2. Protester fails to carry its burden of affirmatively proving its case where its allegation that the contracting agency denied it the opportunity given to the awardee of revising its initial offer is refuted by the agency's account of negotiations and by the record.
3. Agency did not act improperly in not granting protester's request for further negotiations if its offer was not low, since agency was not legally required to reopen negotiations and request a second round of best and final offers from all offerors in the competitive range, negotiations with the protester alone would have been improper, and it would also have been improper to inform protester during negotiations that its price was not low in relation to that of other offerors.

American International Rent A Car protests the General Services Administration's (GSA) award of Federal Supply Schedule contract No. GS02F39077 to Joseph Paul Leasing, Inc. for the rental of motor vehicles in the Syracuse, New York service area. American alleges that the awardee is nonresponsible and implies that American was denied the

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opportunity extended to Joseph Paul of revising its initial offer. We dismiss the protest in part and deny it in part.

Under request for proposals (RFP) No. 2FC-PR-N-A2804, GSA solicited offers for meeting the government's requirements for rental motor vehicles in 18 service areas, including Syracuse and Rochester, New York. Offerors were requested to propose prices based upon percentage discounts from or additions to certain standard rental rates set forth in the solicitation.

GSA received initial proposals for the Syracuse service area only from Joseph Paul and American, with Joseph Paul offering 40 percent off the standard rates and American offering a 35.6 percent discount. American submitted the low proposal for the Rochester area. Since neither Joseph Paul nor American altered the prices set forth in their initial proposals during subsequent negotiations, GSA accordingly made award to Joseph Paul for the Syracuse service area and to American for the Rochester area. After learning of the award to Joseph Paul, American thereupon filed this protest with our Office.

American primarily challenges the awardee's ability to perform. American declares that Joseph Paul negotiated for and represented in this procurement Ajax Rent A Car, a firm which, according to American, has demonstrated under prior contracts that it is too small and lacks the capability of adequately meeting GSA's needs. In support of this contention, American has submitted an advertisement from the telephone directory indicating that Ajax is a division of Joseph Paul and is located at the same North Syracuse address listed by Joseph Paul in its bid and listed in the plant facilities report, i.e., the preaward survey, as the address from which Joseph Paul will perform the contract.

GSA, however, denies that Joseph Paul submitted a proposal as a representative of Ajax and argues that, in any case, the preaward survey indicated that the inventory which will be used in performing the contract is adequate to meet the requirement set forth in the solicitation. In this regard, we note that the survey also states that

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Joseph Paul has satisfactorily performed under a prior contract with GSA.

By questioning the awardee's capability of performing the contract, American is, in effect, challenging the contracting officer's affirmative determination of Joseph Paul's responsibility. However, our Office does not review an affirmative determination of responsibility absent a showing that the contracting officer acted fraudulently or in bad faith or that definitive responsibility criteria in the solicitation have not been met. See Brandhurst Inc., B-214829, June 26, 1984, 84-1 CPD ¶ 669. Since neither exception applies here, we dismiss the protest insofar as it relates to Joseph Paul's responsibility.

American also appears to believe that it initially was the low offeror for the Syracuse area but was displaced by Joseph Paul because the latter was given an opportunity to revise its initial offer which was not also extended to American. There is no merit to this position.

As the basis for its assertion, American states that in mid-January 1984, it was contacted by GSA and asked to "confirm" its original offer. It states it was "not given the impression that any negotiations were going on." As evidence of its understanding, American refers to its January 19, 1984 response to GSA, in which it stated in part:

"The following is to confirm our bid . . .

"I would like to confirm that our [offered discounts are the same as originally submitted].

"Of course, we hope that these bids are enough to make us the successful contractor in our area . . . [W]e do not want to lose the contract and if we were aware that we definitely were not the lowest bidder, we would request further negotiation."

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In mid-March, American again was contacted by GSA and asked to acknowledge a change in the beginning date of the contract period. During this conversation, American states, in response to its inquiry the GSA employee "acknowledged that we were [the low bidder]." American understood this advice to apply to both Syracuse and Rochester.

American's perception appears to be that (1) it had been asked only to "confirm" its initial offer; (2) GSA's failure to initiate negotiations following receipt of American's "confirmation" letter must have signaled that American was the lowest offeror, since it had requested an opportunity to revise its price if it was not; and (3) that despite advice from GSA in March that American was the "low bidder," award of the Syracuse area subsequently was made to Joseph Paul. From these circumstances, American infers that at some point in the process Joseph Paul was permitted to lower its price for the Syracuse area below American's, which did not change.

GSA disputes American's account of the negotiations. GSA admits that price negotiations occurred after initial offers were received, but claims that these occurred when all offerors for the 18 service areas were orally requested in January to submit "best and final proposals" by January 20. GSA further states that on January 16 American advised the agency that American's initial offer constituted its best and final offer and indicated that American would confirm this in writing. This it did in the letter we have quoted above. The agency also denies that American was ever told that it was the low offeror for the Syracuse service area, explaining that contracting officials contacted American in March only because it was in line for award for the Rochester area.

We have previously held that a protester bears the burden of affirmatively proving its case and that when the only evidence on an issue of fact is a protester's statement that conflicts with that of contracting officials, then the protester has not carried its burden of proof. See Printer Systems Corp., B-213978, May 22, 1984, 84-1 CPD ¶ 546. American has furnished our Office no evidence, other than its statement, refuting GSA's account of the

negotiations. As we stated above, Joseph Paul's price for the Syracuse area was lower than American's from the outset, and since neither firm changed its price in response to GSA's January request for best and final proposals, Joseph Paul remained low and received the award. Nothing in the record indicates that any negotiations other than those occurring in January took place after the initial proposals were received. As for the January negotiations, GSA has submitted a number of letters from offerors under the RFP in which the firms wrote of their "best and final" or "final" offers or declined the opportunity to "change" or revise their offers. We believe that the pattern apparent in such letters tends to indicate that GSA indeed informed offerors in general, and American by implication, of the opportunity to revise their offers. Accordingly, we conclude that American has not carried its burden of proof in this regard.

Although this dispute might have been avoided had the agency made the request for best and final offers in writing rather than orally, negotiation was justified here on the basis of public exigency and it would appear from the GSA's allowance of only a week within which to submit best and final offers that the agency did not believe there was sufficient time for a written request. We note that under the Federal Procurement Regulations, 41 C.F.R. § 1-3.805-1(a) (1983), negotiations with offerors may be conducted either in writing or orally. The critical inquiry is not whether negotiations are in writing, but, rather, whether the competition was conducted on an equal basis. See Technical Assistance Group, Incorporated, B-211117.2, Oct. 24, 1983, 83-2 CPD ¶ 477. Given our conclusion that, in view of the record before us, we must accept GSA's contention that American was informed of its opportunity to submit a revised offer, we do not believe that American has shown that competition was not conducted on an equal basis.

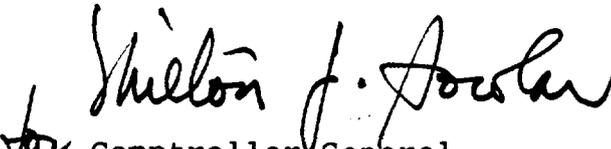
With regard to American's January letter confirming its initial proposal in which it stated that "we do not want to lose the contract and if we were aware that we definitely were not the lowest bidder, we would request further negotiation" we note that an offeror may not in this manner compel an agency to reopen negotiations with it. Further negotiations with American after the closing date for receipt of best and final offers would have been

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improper since GSA did not request a second round of best and final offers from all offerors in the competitive range, see Windham Power Lifts Inc./Quality Plus Equipment, Inc.--Request for Reconsideration, B-214287.2, June 18, 1984, 84-1 CPD ¶ 638 (if agency reopens negotiations with one offeror after the best and final date, then it must reopen negotiations with all offerors in the competitive range), a decision that we will not question, see Louis Berger & Associates, Inc., B-208502, March 1, 1983, 83-1 CPD ¶ 195 (no legal requirement that agency reopen negotiations after receipt of best and final offers). Nor could GSA have informed American during negotiations that its price was not low in relation to that of another offeror. Federal Procurement Regulations, 41 C.F.R. § 1-3.805-1(b) (1983).

For the reasons above, the protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States

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