

DECISION

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

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FILE: B-217111**DATE:** June 27, 1985**MATTER OF:** T. Warehouse Corporation**DIGEST:**

1. Protester's inference that alleged irregularities in agency conduct of negotiations indicate agency's intention to avoid awarding a contract to the protester is insufficient to establish bad faith; in order to establish bad faith, the protester must present virtually irrefutable evidence that agency officials acted with a specific and malicious intent to injure the protester.
2. Although in a negotiated procurement award may be made on the basis of initial proposals under certain circumstances, the decision is discretionary; a procuring agency is under no obligation to make an award on the basis of initial proposals, and no offeror has a legal right to insist on such an award.
3. Where a contracting officer has referred a nonresponsibility determination to the Small Business Administration for consideration under its certificate of competency procedures because of critical need, time pressure, and the belief that the low priced initial offeror was unlikely to be displaced, withdrawal of the referral is proper when, after receipt of best and final offers, it becomes apparent that the offeror is no longer in line for award.

T. Warehouse Corporation (TWC) protests the decision by the Defense Logistics Agency (DLA) not to award TWC a contract on the basis of TWC's initial offer under request for proposals (RFP) No. DLA13H-84-R-8751, issued by the Defense Personnel Support Center (DPSC), for cold storage warehousing.

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TWC was the low offeror based on initial proposals but was found nonresponsible by the contracting officer who referred the matter to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures. TWC alleges that when the contracting officer learned that SBA planned to issue a COC, he improperly requested best and final offers without prior discussions and withdrew the COC referral, to circumvent the COC procedures and avoid an award to TWC.

We deny the protest.

In response to the RFP, which was for a base year plus 2 option years, DPSC received an offer from the incumbent, United States Cold Storage (USCS), and two lower offers from TWC, one approximately \$870,000 lower, and an alternate offer, contingent on obtaining a Department of Labor (Labor) wage determination variance, approximately \$1,030,000 lower.

Because both of TWC's offers were substantially lower than USCS's offer, and since the agency had no previous experience with TWC, the contracting officer ordered a pre-award survey of TWC on August 15, 1984. On September 6, the Defense Contract Administration Services Management Area (DCASMA), Philadelphia, recommended no award. Because TWC had submitted additional information to DLA in the interim, the contracting officer requested DCASMA to review the information. DCASMA did so but did not change its recommendation. On October 1, the contracting officer referred the matter to the SBA under the COC procedures. The contracting officer offered the services of survey team members to accompany SBA on its site inspection, which they did on one of the two SBA inspections. On November 7, SBA informally advised TWC and the contracting officer that it would issue a COC. In response to the contracting officer's stated intention to appeal the COC, SBA delayed the COC issuance.

Also, on November 7, the contracting officer requested best and final offers from both offerors by November 13. The contracting officer states that he believed that this was appropriate before initiating a formal COC appeal. He stated to TWC in an informal briefing that he felt that best and final offers were appropriate since the incumbent probably had not been aware that there would be competition under the RFP, and because of the possibility of obtaining a lower price. The contracting officer also indicates that he did not request best and final offers earlier because the substantial price differential between the two offerors made displacement of the low offeror unlikely. Finally, the

contracting officer notes that after reviewing the detailed material submitted by TWC, he concluded that TWC could perform satisfactorily and, accordingly, at about the time best and final offers were due, he advised SBA that he would not appeal the COC.

After protesting the request for best and final offers, TWC again submitted two offers, one contingent on obtaining a wage variance. USCS submitted one unconditional offer which was lower than TWC's unconditional offer, but higher than TWC's conditional offer. After the contracting officer determined that USCS had submitted the low offer, he withdrew the COC referral from SBA. However, DLA has decided that a final price evaluation cannot be made until a wage variance determination is issued by Labor. A wage variance hearing was held on March 26, but Labor's final determination is still pending. In the interim, DLA has extended USCS's contract on a month-to-month basis.

TWC asserts that it is entitled to award on the basis of its initial proposal. The crux of TWC's protest is that DLA had used the negotiation process to frustrate SBA's COC procedure. In particular, TWC argues that the best and final offers were unjustifiably called for without any prior discussions, and that DLA's withdrawal of the COC referral improperly negated the effect of a COC procedure. TWC contends that DLA intended to make an award on the basis of initial offers with TWC excluded as nonresponsible, but when the COC issuance was imminent, DLA requested best and final offers in bad faith to thwart the award to TWC.

DLA asserts that the advance referral to SBA was appropriate because of the large price differential between the initial proposals and because the storage requirement was critical and urgent. DLA states that when TWC was no longer in line for award after best and final offers, the contracting officer properly withdrew the COC referral. However, the contracting officer concedes that the referral was premature and that negotiations should be concluded before a COC referral.

In our view, TWC has not established that the contracting officer's request for best and final offers constituted a bad faith attempt to circumvent the COC procedure. The protester bears a heavy burden of proof when

alleging bad faith on the part of government officials; it must show by virtually irrefutable proof that these officials had a specific and malicious intent to injure the protester. Kelvar Corporation, Inc., v. United States, 543 F.2d 1295, 1301 (Ct. Cl. 1976). TWC has not met this standard.

Because TWC has submitted no direct evidence, it essentially asks that we infer bad faith. However, we do not find evidence of bad faith based on the record. See Ebonex, Inc., B-213023, May 2, 1984, 84-1 C.P.D. ¶ 495. DLA has explained that the preaward survey was conducted and the COC referral made before the completion of negotiations because of time pressures and the contracting officer's expectation that TWC would remain low after best and final offers. This is reasonable in view of the price differential and the fact that DLA had no contracting experience with TWC. Moreover, a premature preaward survey is justifiable as a means of reducing the amount of time required to ultimately award a contract. Ebonex Inc., supra; Security Assistance Forces & Equipment International, Inc., B-194876, May 5, 1980, 80-1 C.P.D. ¶ 320.

Regarding the decision to ask for best and final offers, the contracting officer states that the request was needed to provide notice to USCS that there was competition, and to realize the possibility of a lower price. The decision to award on initial proposals is discretionary with the procuring activity and an offeror has no legal right to award on its initial proposal. Townsend & Company, B-211762, Mar. 27, 1984, 84-1 C.P.D. ¶ 352. Moreover, regarding TWC's allegation that the call for best and final offers was made without discussions, we point out that the mere request for best and final offers may constitute adequate discussions. ATI Industries, B-215933, Nov. 19, 1984, 84-2 C.P.D. ¶ 540; Information Management, Inc., B-212358, Jan. 17, 1984, 84-1 C.P.D. ¶ 76. Such is the case here, where DLA did not find any deficiencies or improprieties in either proposal and was interested only in realizing lower cost.

The contracting officer has cited two bases for his withdrawal of the COC. First, after evaluation of best and final offers, TWC was no longer in line for award, and second, upon evaluation of TWC's final submissions, he concluded that TWC was capable of performing the contract.

TWC's objection is premised on its assumption that it automatically would have been entitled to an award on the basis of initial proposals if the COC was issued. However, the referral was only withdrawn when TWC was no longer low. Once an offeror is no longer in line for award, the COC referral is rendered academic and should be canceled. Syosset Laboratories, Inc., B-212139, Sept. 23, 1983, 83-2 C.P.D. ¶ 369. Thus, the withdrawal of the referral was appropriate under the circumstances and provides no basis for imputing bad faith to the contracting officer.

Further, the record shows that the contracting officer consistently provided TWC with a broad variety of assistance during this procurement. More significantly, we note that under the Federal Acquisition Regulation, 48 C.F.R. § 19.602-4(c) (1984), the contracting officer was required to wait only 15 days for a COC issuance before he could have made an award to USCS. Instead, he withheld award for more than 1 month in order to permit SBA to complete its review, which also gave TWC time to upgrade its facilities. The granting of an extension beyond the 15-day period for filing or processing a COC application is a matter within the discretion of the contracting agency. American Photographic Industries, Inc., B-206857, Sept. 29, 1982, 82-2 C.P.D. ¶ 295. If the contracting officer's intention was, as TWC asserts, to make an award to USCS under the initial proposal he had ample opportunity to do so while the COC consideration was pending.

We deny the protest.

for 
Harry R. Van Cleve
General Counsel