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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Canadian Commercial Corporation

File: B-222515

Date: July 16, 1986

DIGEST

1. Where protest alleging an impropriety contained in a pre-closing date solicitation amendment was not filed prior to the closing date for receipt of initial proposals, protest is untimely and will not be considered by the General Accounting Office.

2. Protest concerning various procurement irregularities that allegedly occurred during the course of a procurement that was filed more than 10 working days after the protester knew or should have known of the bases for protest is untimely and will not be considered by the General Accounting Office.

3. Protest that agency did not debrief protester and that notice of award was late is dismissed since these are procedural matters which do not affect the validity of the award.

DECISION

Canadian Commercial Corporation (CCC)[1/] protests the award of a fixed-price contract to Rois Manufacturing Company, Inc. (Rois), under request for proposals (RFP) No. DLA120-85-R-1071, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA), Philadelphia, Pennsylvania, for a quantity of medical chests. CCC principally contends that its proposal was improperly excluded from consideration without the firm's having been afforded the opportunity to submit a best and final offer. CCC also alleges that various irregularities occurred during the course of the procurement.

We dismiss the protest.

1/ In accordance with standard procedures for Canadian purchases, CCC was the prime contractor which submitted a proposal on behalf of Hammel Gears, Inc., a Canadian firm and its proposed subcontractor. See the Department of Defense Federal Acquisition Regulation Supplement, 48 C.F.R. Subpart 225.71 (1985). Because of identity of interest and for the sake of simplicity, we refer to both firms in this decision as CCC.

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The solicitation was issued on April 29, 1985, and, as amended, established a closing date of August 30, 1985. The solicitation generally provided that award would be made to the responsible offeror whose offer is the most advantageous to the government, cost or price and other factors specified in the solicitation considered.[2/] Since the requirement had been procured historically on a sole-source basis from Rois, DLA, on July 15, issued an amendment advising Rois that "they [were] now in a competitive situation."

Prior to the closing date, CCC expressed concern to DLA, based on information obtained from CCC's subcontractor, about the availability in the marketplace of a "Nielson" latch, which was a required component of the end item. CCC recommended that offerors be permitted to substitute a "Sessions" latch for the "Nielson" latch. On August 29, a meeting was held between representatives of CCC and DLA procurement officials. The latter advised CCC that because they were uncertain whether the "Sessions" latch was technically acceptable, CCC could submit alternate offers, one offer based on the use of the "Sessions" latch, and a second offer based on use of the "Nielson" latch. DLA also advised CCC that if, but only if, the "Sessions" latch were approved for use in the proposed contract, the solicitation would be amended to revise the specifications to permit all offerors to propose based upon use of that latch.[3/] CCC's proposal did not offer different prices for two alternate latches, but merely conditioned its offer on the use of "all Nielson" or "all Sessions" type latches, and further conditioned delivery on the availability of a sufficient number of "Nielson" latches.

The contracting officer, without amending the solicitation to permit the use of the "Sessions" latch, proceeded to evaluate proposals. On December 17, 1985, in response to a DLA request for an extension of its acceptance period, CCC expressed concern that the delay in making award was creating "serious administrative problems" for the firm. In response, on December 30, 1985, the contracting officer then sent the six highest-priced offerors, including CCC, a notice that they were no longer considered to be in the "competitive range." The use of the "Sessions" latch was disapproved by DLA engineers for technical reasons on February 7, 1986.

[2/] The RFP, however, did not require offerors to submit competing technical proposals and did not specify any other factors besides cost or price elsewhere in the solicitation. Thus, the basis for award was price alone.

[3/] DLA reports that none of the seven other offerors that submitted proposals expressed any concern regarding the availability of the "Nielson" latch, including a second Canadian firm.

Award was made to Rois, the low offeror, on February 28, 1986. CCC was advised of the award on March 14. CCC protested to DLA by letter dated March 27. The protest was denied on April 4. This protest was filed April 18.

If a protest has been filed initially with the contracting agency, any subsequent protest to this Office will be considered if it is filed within 10 days of when the protester learns of initial adverse agency action on the protest, provided that the agency level protest complied with the time limitations prescribed in our regulations. 4 C.F.R. § 21.2(a)(3) (1986). Generally, our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are incorporated by amendment must be protested before the next closing date for receipt of proposals. Id. In other cases, protests must be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

CCC, which has incorporated by reference its agency-level protest in its protest to our Office, has filed what is, in most respects, an untimely protest. CCC's allegations, and our responses, follow.

1) DLA afforded an unfair advantage to Rois over other offerors by informing that firm that it was in a "competitive situation."

DLA's advice to Rois was contained in an amendment, dated July 15, 1985, that was issued prior to receipt of proposals. Since this alleged impropriety was contained in a solicitation amendment and was not protested to the agency prior to the closing date (August 30, 1985), we consider this matter to be untimely under 4 C.F.R. § 21.2(a)(1). (In any event, it is proper to advise a firm with no prior competition that a competition is being conducted. See National Data Corp., 61 Comp. Gen. 328 (1982), 82-1 CPD ¶ 313.)

2) DLA improperly excluded the firm from the "competitive range" in December 1985, thereby deprving it of the benefit of written or oral discussions not allowing the firm an opportunity to submit a best and final offer with a substantially reduced price.

As stated above, under the terms of the solicitation the basis for award was price alone and the contracting officer, on December 30, 1985, sent the six highest-priced offerors, including CCC, a notice that they were no longer considered to be in the "competitive range." Upon receipt of this notice, CCC knew that DLA was not going to hold discussions with it

or allow it to submit a best and final offer. Yet, it did not file its agency protest concerning this matter until March 27, 1986, much later than 10 working days after the basis for protest was known. Therefore, this protest ground is untimely. 4 C.F.R. § 21.2(a)(2).

3) DLA failed to notify CCC at the earliest practicable time that its proposal was no longer eligible for award.

If CCC considered the evaluation period to have been unreasonable in view of the fact that DLA solicited no further submissions from offerors after the August 30 closing date, it should have protested the matter to this Office or to the agency at the latest upon receipt of the rejection notice of December 30. It failed to do so until March 27, more than 10 working days after the basis for protest was known or should have been known. The protest ground is therefore untimely. 4 C.F.R. § 21.2(a)(2).

4) The solicitation's specifications, by requiring only a "Nielson" latch, were overly restrictive since a "Sessions" is a fully acceptable substitute.

CCC's proposal offered "all Nielson" or "all Session" type latches. Upon receipt of DLA's rejection notice, CCC knew or should have known that a "Sessions" latch was unacceptable because the contracting officer had failed to issue an amendment as promised if use of the "Sessions" latch would be permitted. Further, a meeting was held on January 28, during which CCC was told in detail the basis for rejection of its offer. This was confirmed by letter from DLA dated February 26, 1986, explaining the agency's position concerning the "Nielson" and "Sessions" latches. Yet, CCC failed to protest this matter to the agency until March 27, more than 10 working days after the basis for protest was known or should have been known. Accordingly, it is untimely and will not be considered further. 4 C.F.R. § 21.2(a)(2).

5) DLA did not notify CCC of the award until "two weeks after the fact" so that CCC could not take advantage of the requirement that an agency direct the contractor to cease performance if a protest is filed within 10 days of the date of contract award. See 4 C.F.R. § 21.4(b).

This matter is generally procedural in nature and does not affect the validity of the contract award. See Employment Perspective, B-218338, June 24, 1985, 85-1 CPD ¶ 715 at 19. Furthermore, had CCC filed its other protest issues in a timely manner, it would have benefited from the "stay" provisions of the Competition in Contracting Act of 1984 (CICA). Specifically, CCC was notified on December 30 that its offer was rejected, but it did not even protest to the agency until March 27. At the time it received the rejection notice, it was aware that award would be made to another firm. Had a protest on this issue (and others that became ripe on December 30) been timely filed in accordance with CICA,

the withholding of award provision of CICA, 31 U.S.C. § 3553 (Supp. II 1984), would have been in effect. In any event, since the protester's offer was fifth low and was therefore not in line for award, it suffered no prejudice by the delay.

6) DLA failed to grant CCC a debriefing.

DLA states that it did not schedule a debriefing because it is not required when a contract is awarded on the basis of price alone, which is the case here. Federal Acquisition Regulation, § 15.1003(a) (FAC No. 84-7, April 30, 1985). Although this basis for its protest may be timely--the protester raised the issue with DLA within 10 working days of the notification of award to Rois--this issue is not one that this Office ordinarily will consider because the scheduling of a debriefing is a procedural matter that does not involve the validity of an award. See Pan Am World Services, Inc., B-215308.5, Dec. 10, 1984, 84-2 CPD ¶ 641. We therefore also dismiss this aspect of the protest.

CCC requests reimbursement of proposal preparation costs and the costs of pursuing this protest. However, in view of the fact that we are dismissing the protest and have not found any violation of statute or regulation, we deny this request. 4 C.F.R. § 21.6(d).

The protest is dismissed.

Ronald Berger
Deputy Associate
General Counsel