



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Racal Corporation

File: B-233240

Date: February 17, 1989

DIGEST

1. Protest that agency improperly denied the protester the opportunity to compete for a contract award for tape recorders is denied where the agency ordered the recorders from a General Services Administration nonmandatory telecommunications schedule contract after publishing notice of its intent to do so in the Commerce Business Daily and waiting 15 calendar days after publication before placing the order.

2. Procuring agency improperly used a specific make and model specification to order tape recorders under a non-mandatory schedule contract where the agency did not comply with the regulatory requirement to justify, certify and obtain appropriate approval before using noncompetitive procedures.

DECISION

The Racal Corporation protests the award of a contract for tape recorders and associated equipment by the National Aeronautics and Space Administration (NASA) to Honeywell, Inc., under its nonmandatory telecommunications federal supply schedule contract with the General Services Administration (GSA).

We sustain the protest on the ground that NASA improperly used a specific make and model specification without obtaining the required justification and approval.

On September 14, 1988, NASA published in the Commerce Business Daily (CBD) notice of its intention to purchase two Honeywell 101E recorders from Honeywell under the firm's schedule contract with GSA. The notice provided that "[a]ll responsible sources may submit a bid/proposal/quote that will be considered by the agency." According to Racal, it received the CBD on September 22, and by letter dated September 28, requested a copy of the solicitation from

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NASA. Subsequently, on October 5, a NASA employee called Racal and informed the firm that no solicitation would be issued because the recorders were being purchased under Honeywell's federal supply contract. On October 7, Racal learned from NASA that an order had been placed with Honeywell on September 29.

Racal protests that the award to Honeywell is improper because NASA did not comply with applicable regulations requiring procuring agencies to obtain full and open competition in obtaining supplies. More specifically, Racal argues that the CBD notice of NASA's intent to purchase the recorders from Honeywell was defective and precluded Racal from competing for the award. Racal also contends that NASA improperly used a specific make and model specification.

The use of GSA nonmandatory schedules to acquire telecommunications resources is governed by part 201-40 of the Federal Information Resources Management Regulation (FIRMR), 41 C.F.R. part 201-40(a). Purchases from nonmandatory schedule contracts must be made on a competitive basis to the maximum practicable extent. FIRMR § 201-11.001(a). An order placed against a nonmandatory telecommunications schedule contract will be deemed to meet this requirement if the ordering agency follows the procedures of FIRMR § 201-40.008, and the order provides the lowest overall cost alternative to meet the needs of the government. FIRMR § 201-40.008(a)(2).

One requirement of FIRMR § 201-40.008 is that the agency synopsisize in the CBD notice of its intent to place an order against a nonmandatory schedule contract at least 15 calendar days before placing the order. FIRMR § 201-40.008(b). If the agency does not receive any responses, it may place an order under the schedule contract after it documents the file with the results of the synopsis and an analysis that indicates that such an order provides the lowest cost alternative to the government. FIRMR § 201-40.008(c)(1). However, if the agency does receive expressions of interest from non-schedule or other schedule vendors, it must determine if ordering from the schedule or preparing a solicitation will result in the lowest overall cost alternative. FIRMR § 201-40.008(c)(2). If evaluation of the responses indicates that a competitive acquisition would be more advantageous to the government, a formal solicitation should be issued, and all vendors invited to compete. Id.

Here, NASA placed the order with Honeywell on September 29, 15 days after notice of its intention to do so was published in the CBD. At the time NASA placed the order, it had not

received expressions of interest from any vendors, and determined that the award to Honeywell was the government's lowest cost alternative.

Racal argues, however, that NASA did not comply with the intent of the notice requirement--to give non-schedule vendors the opportunity to compete--because the notice was defective. In this regard, Racal complains that because the notice invited the submission of bids or proposals and did not contain a due date for their submission, it was led to believe that a solicitation would be issued.

We do not agree that the CBD notice precluded Racal from submitting an expression of interest to NASA within the 15-day period established by the FIRMR. First, there is no requirement that the CBD notice include a due date for bids or proposals. In addition, while the language in the CBD notice--"All responsible sources may submit a bid/proposal/quote that will be considered by the agency"--was inartfully drafted and may have caused some confusion as to whether a solicitation had been issued, the notice nevertheless informed Racal of the critical fact, that NASA intended to purchase tape recorders from Honeywell's schedule contract. Since Racal's letter expressing interest in supplying NASA with the recorders was not received by NASA until after the 15 calendar days NASA was required to wait before placing an order against Honeywell's schedule contract, we see no basis to conclude that NASA deprived Racal of the opportunity to express its interest in the procurement.

Racal also contends that the CBD notice lacked other information--for example, a request for pricing data--required to be included by FIRMR § 201-40.008(b)(2). Even assuming that the notice should have included such additional information, we fail to see how Racal was prejudiced as a result, since there is no indication that the lack of more detailed information in the notice led to Racal's failure to respond to the notice within the required 15 days.

While in our view the CBD notice was adequate to advise Racal of NASA's intention to order the recorders under Honeywell's schedule contract and allow Racal to express its interest in the procurement, we find that NASA improperly used a specific make and model specification without obtaining the required justification and approval.

To meet the requirements for full and open competition, agencies must comply with FIRMR § 201-11.002-1 when using make and model specifications. See FIRMR § 201-40.008(a)(2). FIRMR § 201-11.002-1(a) provides that a specific make and model specification shall be used only when no other type of specification can satisfy the needs of the government. In addition, the use of a specific make and model specification is considered to be other than full and open competition, and consequently must be certified, justified and approved in accordance with Federal Acquisition Regulations (FAR) §§ 6.303 and 6.304. See FIRMR § 201-11.002-1(b). Under FAR § 6.303-1, before using noncompetitive procedures the contracting officer must prepare a written justification, certify the accuracy and completeness of the justification, and obtain approval for the acquisition from the appropriate agency official. Further, under FIRMR § 201-11.002-1(b)(1), the justification must include, at a minimum, an explanation of why no other type of supplies or services will satisfy the agency's needs and the practical factors which preclude the development of a less restrictive specification.

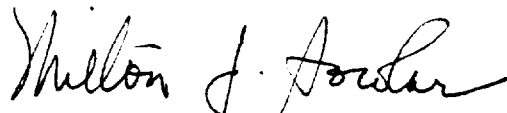
Here, the record does not contain the required justification, certification and approval. Rather, the contracting officer admits that none was prepared and instead relies on three agency documents as support for the award to Honeywell: (1) a note dated September 1, requesting information concerning whether there were any GSA schedule contracts for recorders other than Honeywell's; (2) a memo dated September 12 from the contracting officer stating that while there was another schedule contractor with tape recorders, it could not cross-reference its equipment to the Honeywell equipment without specifications; and (3) a document prepared after the protest was filed stating generally that the contracting officer was told by the party requesting the recorders that only the specified Honeywell equipment would meet the agency's needs.

These documents, however, fall far short of meeting the requirements of the FIRMR in form and content. Notably, they do not demonstrate why no recorders other than the specified Honeywell model could satisfy the requirement, or why NASA could not develop less restrictive specifications. In addition, the contracting officer did not obtain the necessary approval to award a contract on a noncompetitive basis which, in this case, was required to be obtained from NASA's competition advocate since the order exceeded \$100,000. See FAR § 6.304(a)(2). Further, we think NASA's failure to follow the procedures to justify a noncompetitive award is especially questionable since NASA knew by September 12 that there was another possible source for the

recorders, a schedule contractor who stated that it could not compare its equipment to the Honeywell equipment without specifications.

Under these circumstances, we find that NASA failed to meet the requirements for use of a specific make and model specification. Accordingly, we sustain the protest on this basis. See NI Industries, Inc., Vernon Division, B-223941, Dec. 15, 1986, 86-2 CPD ¶ 674. Because the protest was filed more than 10 days after the order was placed with Honeywell, NASA was not required to suspend performance pending a decision on the protest. See Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d)(1) (Supp. IV 1986). NASA has advised us that delivery under the order has been completed; accordingly, we are unable to recommend corrective action. However, we find that the protester is entitled to recover the costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988).

The protest is sustained.

for 
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