



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fielman, S.L.
File: B-258523.2; B-258523.3
Date: February 21, 1995

Paralee White, Esq., and Laurel A. Hockey, Esq., Cohen & White, for the protester.
James N. McCutcheon, Esq., and Eric A. Lile, Esq., Department of the Navy, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to notify protester that quotations would be considered firm offers under an oral solicitation is denied where record suggests protester had reason to offer its best price and, in any case, there is no indication that the protester was prejudiced by any failure by the agency to provide notice of the solicitation.

DECISION

Fielman, S.L. protests award of a contract to InterJetServe, S.A., under request for quotations (RFQ) No. N68171-94-Q-0107, issued by the Department of the Navy for passenger and baggage support services at the Naval Air Station in Rota, Spain. The protester argues that the award was made on a de facto improper sole-source basis.

We deny the protest.

The RFQ, issued on September 2, 1994, solicited prices for short-term air terminal services as a "bridge" between the agency's existing long-term contract for the same services, which was to expire September 30, and the contemplated replacement long-term contract to be awarded under request for proposals (RFP) No. N68171-94-R-0045, issued on May 11, 1994. While six proposals, including one from the protester, had been received in response to the RFP, award was delayed because of the need to resolve the question of

how severance payments to contractor employees, required under Spanish law, should be handled.¹

Since the agency expected the time period for revision of the RFP in this regard to extend beyond the September 30 expiration date of the existing contract, and because of the critical nature of the services, the agency attempted to negotiate an extension with the incumbent contractor. These negotiations failed, however, and in order to assure continuation of the services, on September 2, the agency faxed the RFQ to the six firms which had submitted proposals under the RFP. The RFQ specified a base period of 3 months (October 1, 1994 through December 31, 1994) and two 3-month option periods (January 1, 1995 to March 31, 1995 and April 1, 1995 to June 30, 1995). It also incorporated the statement of work from the RFP. The line items in the RFQ were identical to those in the RFP (except that the line items concerning Navy liability for potential severance payments were deleted from the RFQ).

The Navy received quotations from each of the six firms by the September 9 deadline. InterJetServe submitted the second-low quote (the low quoter was determined to be nonresponsible) and Fielman submitted the third-low quote. On September 15, the Navy awarded a contract to InterJetServe based on its low price. This protest by Fielman ensued.

Subsequent to the filing of this protest, the Navy executed a justification for use of an oral solicitation in accordance with the requirements of Federal Acquisition Regulation (FAR) § 15.402(f). The basis for the justification was the agency's determination that "processing a written solicitation would have delayed the acquisition of critical air terminal support services to the detriment of the government."² In this regard, according to the agency, on August 31 and September 1, 1994, prior to issuing the RFQ, the contracting officer telephoned representatives of the six firms which submitted proposals under the RFP to notify them of the oral solicitation and specifically told them (1) of the agency's intention to

¹The issue came to the forefront only after recent Department of Defense (DOD) reductions in force at other installations in Spain led to contractor employee claims for severance payments.

²The record indicates that the majority of DOD air traffic to and from forward deployed forces in Africa, the Mediterranean, the Persian Gulf, the Baltic states, Eastern Europe, and the Indian Ocean passes through the Naval Air Station at Rota.

solicit offers for an interim contract, (2) that the interim contract would be based on the same statement of work as contained in the follow-on RFP and would relieve the successful contractor of severance liabilities, and (3) that a facsimile document would be sent within the next few days to assist in the preparation of offers. The Navy maintains that it properly made award based on the RFQ, which was part of this oral solicitation.

Fielman disputes that it was notified that the RFQ was part of an oral solicitation or that it was otherwise aware that the quotations would be considered firm offers upon which award would be made. In support of its position, the protester cites the RFQ itself, which indicated that "[t]his is a request for information and quotations furnished are not offers," as well as the contracting officer's cover letter to the RFQ which stated "[f]ollowing the receipt of quotations, companies will be notified of further actions to fulfill this service." Fielman concludes that the award essentially was made on an improper sole-source basis.

The record contains no definitive evidence that Fielman was notified of an oral solicitation or that quotations would be considered firm offers. While the agency maintains that it notified the protester of an oral solicitation during the pre-RFQ telephone conversation between the parties, the Navy has no contemporaneous record that this was the subject of the conversation, and Fielman maintains that the parties discussed only the agency's intention to shorten the term of the contemplated contract under the RFQ.

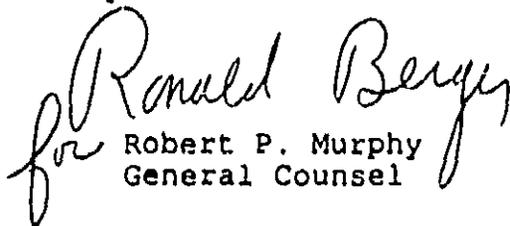
However, whether or not Fielman received express notice, we find that the record does suggest that Fielman was aware that its quote had importance beyond a mere informational price. We think Fielman and the other five offerors on the RFP were or should have been aware from the performance dates in the RFQ that the purpose of this RFQ was to fill the agency's needs for an interim period between expiration of the current long-term contract and the award of the new one. This awareness, together with the short period (3 weeks) between the due date for RFQs and the expiration of the existing contract, lead us to believe that, even without specific notice from the agency, Fielman and the other offerors should have understood that their quotes would be the basis for the interim contract award. Other indicia support this view. The cover letter on Fielman's quotation stated that "[i]n the event [the firm] is awarded this contract we [would be] able to begin performing within 24-48 hours of notification to proceed." While the protester explains that this cover letter statement was intended to refer to a contract under the RFP, there is nothing on the face of the letter which suggests that the statement refers to other than the quotation for the interim

period. It is also notable, we think, that the protester hand delivered its quotation from Spain to the contracting officer in Naples, Italy; while this certainly is not definitive evidence, along with the other factors discussed above, it tends to support the view that Fielman in fact was aware that this quotation was not strictly for informational purposes, and that it would act at its own peril by not submitting its best price.

In any event, even if we agreed that Fielman was not on notice of the potential import of its quotation, there is no evidence of prejudice to Fielman. Prejudice is an essential element of a viable protest, and where no prejudice is shown or is otherwise evident, our Office will not sustain a protest, even if a deficiency in the procurement is evident. Colonial Storage Co.--Recon., B-253501.8, May 31, 1994, 94-1 CPD ¶ 335. Fielman's allegation of prejudice consists of the following statement in its protest submissions: "[h]ad the Navy actually solicited offers, [the firm] might well have been the low offeror." Fielman does not assert, and the record contains no evidence, that it would have lowered its total price by the 20 percent necessary to meet the awardee's price. The agency specifically argues that Fielman would not have lowered its price by this amount, pointing to the fact that the firm's quotation prices are consistent with those the firm submitted under the pending RFP. Fielman does not respond to the agency's argument in this regard. We therefore have no basis to find a reasonable possibility that Fielman was prejudiced by any lack of notice that its quotation price would be considered for purposes of awarding the interim contract.

Fielman further argues that the agency conducted improper discussions solely with the awardee, as evidenced by the inclusion in the awarded contract of terms and conditions not included in the RFQ. The agency responds that including the additional terms in the awarded contract was necessitated by the oral solicitation approach it followed, and that none of the added terms would have affected the proposals. The protester has not disputed or rebutted the agency's response; it points to no specific provisions that would have led it to change its quotation. Thus, again, even if there was some technical impropriety by the agency, there is no evidence or reason to believe that it resulted in prejudice to Fielman.

The protest is denied.


for Robert P. Murphy
General Counsel