DECISION

DIGEST - L+Cont

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

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FILE: B-184855 DATE: January 28,1976

MATTER OF: Rotherm Corporation; Dominion Chemical Company

DIGEST:

1. Protester who did not protest use of IFB to make repurchase in order to mitigate damages of defaulted contractor until more than 10 days after bid opening is untimely since protests shall be filed not later than 10 days after basis of protest is known. Similarly, protest based upon irregularities in conduct of negotiations made known to protester in debriefing is untimely since it was not filed within 10 days of debriefing.

2. Where reprocurement is for account of defaulted contractor, and repurchase is in excess of quantity under defaulted contract, regulation provides that entire quantity shall be treated as new procurement. Therefore, procurement was properly effected under new solicitation rather than on basis of original RFP. Moreover, present record does not show that contracting officer acted unreasonably under either procurement.

This is a protest by Rotherm Corporation (Rotherm) and Dominion Chemical Company (Dominion) against the award of a contract to any other bidder, under invitation for bids (IFB) No. DSA400-76-B-0779, issued by the Defense General Supply Center (DGSC), Richmond, Virginia, for the repurchase of various quantities of antifreeze and related products.

The original purchase had been made under request for proposals (RFP) No. DSA400-75-R-3697, which was issued on March 8, 1975, with closing date for receipt of initial proposals set for April 14, 1975. We have been advised that the authority for negotiation was 10 U.S.C. § 2304(a)(10) (1970), as implemented by Armed Services Procurement Regulation (ASPR) § 3-210.1 (1974 ed.). Rotherm and Dominion were two of 13 firms that submitted proposals.

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The contracting officer determined that all 13 proposals were within the competitive range. A TWX message was sent to all offerors on May 6, 1975, informing them that items 57-104 had been revised and negotiations were opened on those items with best and final offers requested by May 9, 1975. On May 7, 1975, a second TWX message was sent correcting the first message and requesting best and final offers be submitted by May 13, 1975. Eight firms submitted revisions to their offers.

The record shows that after the 13 offers were evaluated for transportation costs, the contracting officer determined that the proposal submitted by Schroeder International Chemical, Inc. (Schroeder), was low on items Nos. 1, 3-14, 19-26, 42-44, 57-88, 93, 95, 99-101, 104, 106, 108, 109, 111-119, and 121-125.

On May 9, 1975, the contracting officer requested that a preaward survey be conducted to make a determination of Schroeder's responsibility. The survey request specifically advised that the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 et seq. (1970), was applicable. In its initial offer Schroeder represented itself as a regular dealer. However, on May 30, 1975, Schroeder changed its classification to that of manufacturer.

In the report submitted by the Agency it is stated that the surveying activity, Defense Contract Administration Services District, Baltimore, Maryland, on May 29, 1975, recommended "No Award." The recommendation was based on a finding that Schroeder's financial capability was unsatisfactory. The report also advised that Schroeder did not qualify as a regular dealer under ASPR § 12-603.2 (1974 ed.) but was qualified as a manufacturer under ASPR § 12-603.1.

On June 3, 1975, representatives of Rotherm met with the contracting officer and they were advised that there would be no further negotiation and the Government was going to proceed to award the contracts.

On June 10, 1975, the surveying activity advised the contracting officer that it had reversed its unsatisfactory rating on Schroeder's financial capability and that Schroeder was now recommended for the award.

The report furnished our Office states that on June 11, 1975, Schroeder was asked to produce evidence that its catalog price for antifreeze met the criteria specified in ASPR § 3-807.1(b)(2) (1974 ed.) as required by ASPR § 3-404.3(c)(1)(d) (1974 ed.) for use with

the Economic Price Adjustment clause as used in the solicitation which provided for a 10-percent ceiling on price increases. Schroeder was advised by the procuring activity that if its catalog price did not meet the requirements of ASPR § 3-404.3(c)(1)(d), it could delete the clause from its offer. By letter dated June 11, 1975, Schroeder deleted the clause from its offer.

On June 27, 1975, a contract was awarded to Schroeder for the items previously listed for the amount of $5,762,582.60. Deliveries were required to begin on August 22, 1975. After award, Schroeder found itself unable to perform the contract, allegedly because of difficulties with its supplier of ethylene glycol. On August 19, 1974, Schroeder advised the contracting officer that its contract had been abandoned and on the same day the contract was terminated for default. On August 20, 1975, the contracting officer initiated a repurchase of the antifreeze portion of the contract by issuing the IFB in question. Amendment No. 1 to the IFB was issued on August 26, 1975, extending the bid opening date to September 10, 1975.

On August 29, 1975, and September 17, 1975, protests were received in our Office from Rotherm and Dominion, respectively. Both protesters assert that the IFB issued to make the repurchase should be canceled and that an award should be made to the lowest offeror under the RFP.

In this connection, Rotherm notes that after the initial award had been made but prior to Schoreder's default, it attended a debriefing at DGSC on July 1, 1975, at which an abstract of the offers was distributed to the firms in attendance. Rotherm contends that due to the unauthorized disclosure by Government personnel of Rotherm's prices and price-related information, it was bidding at great disadvantage under the contested IFB. In addition, Rotherm contends that it never received telegrams dated May 6 and 7, 1975, requesting best and final offers and that, as a result, negotiations were conducted with other offerors but not Rotherm. Further, Rotherm alleges that its waiver of the Economic Price Adjustment clause was disclosed to Schroeder, which deleted the clause from its offer, thereby causing Schroeder to become the low offeror on a substantial portion of the contract items rather than Rotherm. We feel that the latter two issues raised by Rotherm are untimely under section 20.2(b)(2) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), which provides that protests shall be filed not later than 10 days after the basis of the protest is known or should have been known. Since these contentions should have been known by Rotherm no later than July 1, 1975, the date of the debriefing, and since its protest was not received in

our Office until August 29, 1975, these issues are clearly untimely and not for consideration on their merits.

It is also our view that Dominion's protest is untimely under section 20.2(b)(2) of our Bid Protest Procedures, supra. Dominion has protested the issuance of the IFB to make the repurchase. The IFB issued to make the repurchase was issued on August 20, 1975, with bid opening on September 10, 1975. It was therefore incumbent upon Dominion to protest the issuance of the IFB no later than the date set for bid opening. Therefore, Dominion's protest, which was received in our Office on September 17, 1975, is untimely and will not be considered on its merits.

In regards to Rotherm's claim that since its prices and pricing data had been made public at a debriefing, and that the subsequent IFB used to make the repurchase should be canceled and award made pursuant to the original RFP, ASPR § 8-602.6(a) and (b) (1975 ed.) provides that a repurchase may be made for a quantity in excess of the undelivered quantity under the defaulted contract, which was the case here, and the entire quantity shall be treated as a new procurement. Therefore, we believe the procedure followed here was in accordance with the applicable regulation.

From a careful review of the record it would appear that the actions of the contracting officer were proper. It is apparent that at the time of the debriefing, the contracting officer was unaware that Schroeder would default. It was not contemplated that any further awards would be made to secure the antifreeze and related products. Since formal advertising is the preferred method of procurement, we cannot say on the record before us that the course of action followed did not represent a reasoned exercise of procurement judgment. The protest is therefore denied.

Deputy Comptroller General
of the United States