DOCUMENT RESUME

03030 - [A2153271]

[Protest to Lack of Notification of Change in Contract Period and Assertion That Protest Was Untimely]. B-188416. August 1, 1977. 4 pp.

Decision re: Development Associates, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Employment and Training Administration; E. H. White, Inc.
Authority: Comprehensive Employment and Training Act of 1973 (P.L. 93-203, sec. 2; 87 Stat. 839). F.P.R. 1-3.805-1, 1-3.805-1(d). B-181723 (1975). B-186313 (1976). B-184318 (1976). 4 C.P.R. 20.2(b)(2).

Protest was made to the award of a contract on the basis that protester had not been notified of a change in the period of performance. Contracting agency contended that the protest was untimely. Bidder asserted that they hand-delivered protest within 10 working days, and agency did not deny assertion, therefore the protest was considered timely. Change in performance time during negotiations from 11 weeks to 6 months was a substantial change and must be issued by written amendment and given to all offerors in competitive range. Protest was sustained. (DJM)

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DECISION

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

FILE: B-188416 DATE: August 1, 1977

MATTER OF: Development Associates, Inc.

DIGEST:

1. Where protester asserts that it hand-delivered protest to appropriate agency official within 10 working days, as required by 4 C.F.R. § 20.2(b)(2), and agency does not deny assertion, but rather states it has no knowledge of having received it on that date, protest is considered timely.

2. Change in performance time during negotiations is substantial change and must be made by written amendment to solicitation communicated to all offerors in competitive range. See FPR § 1-3.805-1(d).

Request for proposals (RFP) No. ONP 76-16 was issued by the Employment and Training Administration (ETA), Department of Labor, on September 8, 1976, for the development and field testing of a questionnaire to be used to assess the impact of Indian programs under the Comprehensive Employment and Training Act of 1973, Pub. L. 93-203, § 2, 87 Stat. 839. The RFP specified that the period of performance was to be 11 weeks.

Nine proposals were received, and based on the technical evaluations seven of them were considered outside the competitive range. E.H. White, Inc. (White), and Development Associates (DA) were considered to be within the competitive range, and negotiations were held with each offeror. On January 10, 1977, the final day of negotiations with White, and after DA had submitted its best and final offer, the contracting officer notified White that the period of performance was being extended to 6 months. DA was not notified of this change. White accepted the revision without any change in its price or technical proposal. Although DA was ranked higher technically, the contract was awarded to White on January 10, 1977, on the basis that White's estimated costs were 21 percent lower than DA's.

DA was notified by telephone on January 24, 1977, that the contract had been awarded to White. This was confirmed by letter dated January 24 and received by DA on January 25. The letter stated that the period for performance was 6 months.

By letter to ETA dated February 4, 1977, DA protested the award of the contract to White on the ground that ETA had not notified DA of the changed period of performance as required by Federal Procurement Regulations (FPR) § 1-3.805-1 (1964 ed.). DA argued that had it known that the performance time had been expanded it would have allocated personnel costs and other factors differently and, consequently, would have been able to reduce the price of its best and final offer. DA stated that it hand-delivered this letter on February 4, 1977, to the office of the contracting officer who signed the notification of award.

By letter filed in our Office on February 17, 1977, DA protested the award of the contract on the same ground and requested that our Office order ETA to stop all work on the contract during the pendency of the protest, find the award invalid, and require ETA to issue a new solicitation.

Regarding DA's request that our Office order all work stopped on the contract during the pendency of the protest, our Office does not have the authority to issue such an order. Graphical Technology Corporation, B-181723, March 27, 1975, 75-1 CPD 183.

ETA contends that DA's protest dated February 4 was untimely because it was not filed within 10 working days from the time that the basis for the protest was known, as required by our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1977). ETA argues that DA knew of the basis for its protest on January 24, 1977, and did not "file" its protest until February 9, 1977 (12 working days), when it was stamped in the Division of Contracting Services. ETA states that it has no procedure for stamping correspondence and, consequently, cannot verify the hand delivery of DA's protest on February 4. It suggests that DA be required to submit proof of the hand delivery.

DA argues that it should not be held responsible for internal agency delays in having the protest reach the appropriate action officer.

In Burroughs Corporation, B-186313, December 9, 1976, 76-2 CPD 472, we addressed the issue of requiring proof of timeliness. Burroughs, the protester, asserted that it became aware of the basis for its protest on a date that made the filing of its protest timely. The successful contractor argued that Burroughs should be required to prove that fact. We stated that:

> "We are unable to agree with * * * [the] assertion that Burroughs should be required to demonstrate by concrete evidence that its protest is timely. Rather, we believe * * * that Burroughs' protest should be considered timely in the absence of objective evidence to the contrary."

In this case DA has asserted that it hand-delivered its letter of protest on February 4 to an apparently appropriate place, the office of the ETA contracting officer who signed the notification of award. ETA does not deny this assertion or present evidence to the contrary, but rather states that it has no knowledge of receiving the protest until it was date-stamped at another office. We believe, under the circumstances, that DA's protest should be considered timely.

In response to DA's claim that ETA was required to notify it of the change in the performance period, ETA contends that since the change was not substantial enough to affect the technical ratings or costs of the other offerors, it was not required to notify them. ETA states further that DA's contention that it could have reduced costs if notified of the change is conjectural, as neither White nor DA included overtime costs to meet the 11-week requirement and White did not change its cost when it accepted the change in performance time.

Federal Procurement Regulations subsection 1-3.805-1(d)(1964 ed.) provides, in pertinent part, that:

> "When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor."

Generally, the time for performance is a material factor in a solicitation, and any change should be made in writing as an amendment to the solicitation. When the competitive range has been established notification may be limited to those firms within the range. See Iroquois Research Institute, B-184318, February 23, 1976, 76-1 CPD 123. In the instant case, it appears to be reasonable that extended performance time might have allowed DA to allocate personnel and other factors in such a manner as to reduce costs. While it is true, as Labor contends, that any effect on cost is speculative, we believe the way to determine this is through competition. Since DA was within the competitive range, ETA should have notified DA of the change in writing and permitted it the opportunity to revise its proposal in response. Accordingly, DA's protest is sustained.

The current status of the procurement, however, renders any recommendation for corrective action impracticable, since work under the contract, as extended, is scheduled to be completed on September 15, 1977.

However, by letter of today to the Secretary of Labor, we are directing his attention to the deficiency in this procurement to preclude a repetition in future procurements.

R. F. Keller

Deputy Comptroller General
of the United States