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DECISION



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

FILE: B-190186

DATE: April 20, 1978

MATTER OF: Byron Motion Pictures Incorporated

DIGEST:

1. Cancellation of solicitation after bid opening due to omission of delivery provision was proper exercise of contracting officer's discretion, notwithstanding bidders' familiarity with delivery provision from previous contracts with agency, where omission was deemed to render solicitation materially deficient and therefore constituted compelling reason for cancellation. Lowering of price under IFB by awardee under RFQ does not affect cancellation.
2. Protest by Federal Supply Service (FSS) contractor who participated in agency's competitive procurement of requirements under RFQ filed after award of contract under RFQ to non-FSS contractor is untimely filed and not for consideration on merits where protester was notified of award of FSS contract prior to closing date for receipt of quotations. Since negotiated and urgent nature of RFQ was obvious from circumstances, protest after closing date against failure to extend then current contract for 30 days to permit formal advertising is also untimely.

Byron Motion Pictures Incorporated (Byron) protests against the United States Department of Agriculture's (USDA) rejection of the firm's bid in response to invitation for bids (IFB) No. IFB-00-77-B-56, cancellation of the IFB, the subsequent issuance of request for quotations (RFQ) No. RFQ-00-77-Q-63, and award of a contract under the RFQ to another firm.

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The IFB, issued on August 29, 1977, contemplated the award of a requirements contract for fiscal year 1978 for color duplicate reproductions of 5- and 30-minute video programs on 2-inch video tapes and 30-minute U-Matic video programs on 3/4-inch video cassettes. Bids were received from Byron and Tele-Color Productions, Inc. (TCP), at the bid opening on September 19, 1977. Byron was the low bidder.

Upon review of the bids preparatory to making an award, however, USDA discovered that three provisions, paragraphs 7, 8 and 9 of section H, Special Provisions, had been accidentally omitted from the IFB. Paragraph 7, subsequently included in the aforementioned RFQ, provides as follows:

- "7. PICK-UP AND DELIVERY SERVICE. For the 30-minute 'A Better Way' show, it shall be the responsibility of the Contractor to complete the reproductions, pack the original and each reproduction in individual shipping cases furnished by the Department and release to a specified express agency for air shipment, or deliver to the Post Office for parcel post mailing, as specified, within 24 hours after receipt of original master. Shipment will be made to television stations COLLECT at destination, or prepaid by the U.S. Department of Agriculture as designated at time of delivery to the Contractor. For the 5-minute 'Down to Earth' show, videotapes will be bagged for pick-up by USDA messengers within seven (7) calendar days. Master tapes and videocassette copies of both shows will be picked up by USDA messengers."

On September 20, 1977, USDA determined that the omission of the above-quoted delivery requirements provision from the IFB rendered the IFB specifications so materially deficient that it was in the Government's best interests to cancel the IFB. On the following day USDA issued amendment No. A-01 to the IFB, which advised that "IFB-00-77-B-56 is cancelled in its entirety due

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to inadequate specifications." Byron filed its protest against the cancellation of the IFB with our Office on September 22, 1977.

USDA made a Determination and Findings (D&F) on September 21, 1977, authorizing negotiation of the proposed contract without formal advertising on the basis of urgency, pursuant to 41 U.S.C. § 252(c)(2) (1970). An RFQ for the identical requirements was issued on the same day, calling for quotations to be submitted on September 23, 1977. Four quotations, including Byron's, were received; negotiations were conducted with the four offerors from September 23 through September 26, 1977; and best and final offers were required to be submitted on September 27, 1977.

During negotiations on September 23, 1977, Byron personnel advised USDA that the firm had a Federal Supply Schedule (FSS) contract for the required services for fiscal year 1978 and that USDA would become a mandatory FSS user on October 1, 1977. USDA verified Byron's information with the cognizant General Services Administration (GSA) contracting officer, who further informed USDA that the maximum order limitation (MOL) under Byron's contract was \$100,000 and that prices would have to be obtained from Byron because price lists had not yet been published. Byron furnished USDA both its FSS contract prices and the firm's best and final offer by letter dated September 26, 1977.

By letter of October 3, 1977, which advised GSA of the procuring activity's reproduction requirements, the coverage under the FSS, and the existence of three Schedule suppliers, USDA requested authority from GSA to procure the requirements competitively on the open market on the grounds that the guaranteed minimum requirements would exceed the pertinent schedule's MOL. See Federal Property Management Regulations § 101-26.106 (1977); General Services Procurement Regulations § 5A-73.205-6 (1977); Stancil-Hoffman Corporation, B-189134, November 17, 1977, 77-2 CPD 360. GSA granted the requested authority by an endorsement appended to USDA's letter on the same date.

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On October 4, 1977, USDA made a D&F to award contract No. 53-3142-8-129 under the RFQ to TCP; the contract was awarded to TCP at the price of \$69,185.96 on the following day. Byron's protest against the RFP was filed with our Office on October 6, 1977.

Byron essentially contends that USDA's actions in canceling the IFB, resoliciting its requirements under the RFQ, and effecting the procurement outside the FSS constitute abuses of discretion and violate applicable procurement regulations. More specifically, Byron asserts that:

1. Because Byron and TCP were previously awarded similar USDA contracts, and were "well aware *** of what the delivery provision calls for," the omitted provision was "by no means critical" to the procurement under the IFB.
2. Omission of the delivery provision was caused by Government error, was not critical to performance, and therefore was not a legitimate reason to cancel the solicitation. Consequently, the IFB should be reinstated and award made thereunder to Byron as the low, responsive bidder.
3. Cancellation of the IFB after bid opening violated the confidentiality of the formal bidding system, allowing TCP to reduce its offered price upon resolicitation of the requirements, to Byron's prejudice.
4. Issuance of the RFQ on the basis that USDA's requirements would not permit the delay incident to formal advertising was improper because USDA should have obtained a 30-day extension of its then current reproduction services contract.
5. Byron's FSS contract prices and offer under the RFQ, whether based upon the estimated quantities or the guaranteed quantities in

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the solicitation, did not exceed the applicable schedule MOL. USDA, as a mandatory FSS user, was therefore not justified in procuring its requirements from other than a Schedule contractor.

Federal Procurement Regulations (FPR) § 1-2.404-1(b) (1964 ed. amend. 121) provides that:

"Invitations for bids may be canceled after opening but prior to award, * * * where * * * the contracting officer determines in writing that cancellation is in the best interest of the Government for reasons such as the following:

(1) Inadequate, ambiguous, or otherwise deficient specifications were cited in the invitation for bids. * * *"

USDA's contracting officer made a written determination that omission of the delivery provision made the solicitation's specification so materially deficient that cancellation of the IFB was in the best interest of the Government. The authority vested in a contracting officer to decide whether to cancel a solicitation is extremely broad, and in the absence of a showing of abuse of discretion, a contracting officer's decision to cancel an IFB will be upheld. 49 Comp. Gen. 584 (1970); D. Moody & Co., Inc., B-182399, June 3, 1975, 75-1 CPD 335. Cancellation is permitted only for compelling reasons. Scott Graphics, Inc., et al., 54 Comp. Gen. 973 (1975), 75-1 CPD 302; Culligan Incorporated, Cincinnati, Ohio, B-189307, September 29, 1977, 77-2 CPD 142. Two factors must be examined to determine whether a compelling reason requisite to cancellation exists: (1) whether the best interest of the Government would be served by making an award under the subject solicitation, and (2) whether bidders would be treated unfairly and disparately if such an award were made. Switlik Parachute Company, Inc., B-188404, July 20, 1977, 77-2 CPD 38.

We cannot agree with Byron's assertion that the delivery provision was not critical to USDA's procurement under the IFB. We have long recognized that "failure to

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include a required or desired delivery date in an invitation is improper and grounds for cancellation." 51 Comp. Gen. 518, 521 (1972). Byron, however, contends that both the firm and TCP were familiar with USDA's delivery terms and therefore not prejudiced by their omission from the IFB. The question of prejudice to the bidders, however, is not dispositive of the propriety of cancellation in the instant procurement. An award under the IFB would not have obligated the awardee to make delivery in accordance with USDA's needs; thus, a compelling reason existed for cancelling the IFB because such an award would not have served the Government's best interest. See Westinghouse Electric Corporation, B-182249, February 25, 1975, 75-1 CPD 112. Because of this, the protest on the first two grounds is denied.

With regard to Byron's third contention that the firm was prejudiced by TCP's price reduction upon resolicitation, we will not conjecture as to the cause of the lowering of prices under the RFQ. Tennessee Valley Service Company-Reconsideration, B-188771, September 29, 1977, 77-2 CPD 241; Santa Fe Engineers, Inc.-Request for Reconsideration, B-184284, July 22, 1976, 76-2 CPD 67. We note, however, that Byron had the same opportunity to offer a reduced price in competing under the RFQ.

Byron's last two contentions are untimely filed under our Bid Protest Procedures, 4 C.F.R. part 20 (1977), and will not be considered on the merits. Section 20.2(b)(1) of our Procedures requires in pertinent part that:

"[p]rotests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals. * * *"

Under these contentions, Byron, as the current holder of FSS contract No. GS-03S-48421, asserts that USDA, as a mandatory FSS user, was not justified in procuring its requirements by means of an RFQ and from other than a Schedule supplier. This raises a question tantamount to such an impropriety. The fact that the procuring activity

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requirements were not being purchased from the FSS was readily ascertainable from the face of the RFQ.

As mentioned above, the RFQ was issued on September 21, 1977, and quotations were to be furnished to USDA by 2 p.m. on September 23, 1977. Byron's quotation was signed by the firm on September 22, 1977. We believe that Byron knew, or had reason to know, that it was an FSS contractor at the time its quotation was submitted to USDA (i.e., prior to the closing date for receipt of quotations). We have recently ascertained from GSA that Byron was notified of the award of its FSS contract by GSA letter dated September 15, 1977. Our conclusion is further supported by the fact that at some time between 2 p.m. (the deadline for receipt of quotations) and the close of business on September 23, 1977, Byron informed USDA during negotiations that the firm was a Schedule contractor for the items being procured.

Consequently, the appropriate time to protest against the RFQ was prior to the closing date for receipt of quotations, September 23, 1977. Because Byron did not file its protest concerning the RFQ with our Office until October 6, 1977 (the day after award to TCP), the protest on this ground is untimely filed.

As for contention 4, Byron as a quoter under the RFQ was aware of the negotiated aspect of the procurement. We recognize that Byron may not have actually known that the basis for negotiation was the urgency exception to formal advertising. The record shows that the IFB was canceled on September 20, the RFQ was issued on September 21, the closing date was 2 days later, and performance was to begin on October 1. In our view, these circumstances lead us to conclude that the urgency nature of the procurement was obvious and should have been, but was not, protested prior to the closing date.

Accordingly, the protest is denied in part and dismissed in part.


Deputy Comptroller General
of the United States