

DECISION



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

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FILE: B-179880

DATE: January 15, 1974

MATTER OF: Randy International, Ltd.
Berkley Air Services Corporation

DIGEST: In situations where similarly priced bids have been received, our Office feels that phrase "other factors properly to be considered" (FPR sec. 1-2.407-6(a)) in determining equality of bids means those criteria which are inherent in solicitation and not those extraneous circumstances which may become significantly attractive to procurement activity only because tie bids have been received. In instant case, an incumbent contractor's past performance record is such an extraneous circumstance

Where two equal bids were received on procurement of freight forwarding services and award was made to incumbent firm rather than drawing lots as required by FPR sec. 1-2.407-6(b), our Office recommends that agency now draw lots and, if protestor wins drawing, that previous award be terminated for convenience of Government and award be made to previously unsuccessful bidder for remaining services.

Department of Commerce advertised solicitation No. 4-36202 for international air freight forwarding services to be used from September 1, 1973, to August 31, 1974, by United States commercial exhibitors at international trade expositions was issued on August 3, 1973.

Participating exhibitors at these trade fairs are instructed to ship exhibits to the international freight forwarder selected by the Department of Commerce. The freight forwarder, in turn, consolidates the shipments of different exhibitors; arranges for transport with direct air carriers also designated by Department; pays the air carrier and then bills the exhibitors for all shipping costs. The Department makes every effort to select qualified and reputable international air forwarders which are authorized to consolidate shipments at more economical tariffs than direct air shipment tariffs, thus benefiting United States exhibitors.

In the instant procurement, bids were received from five firms. Berkley Air Services Corporation (Berkley) and Randy International, Ltd. (Randy), each bid no charge for each of the four accessorial items stated in the solicitation.

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Berklay was awarded the contract on August 28, 1973, without a drawing by lot as set forth in section 1-2.407-6(b) of the Federal Procurement Regulations (FPR). The decision to award without drawing lots was based upon Berklay's experience in satisfactorily performing the services for the past 5 years and because of the delays and inconvenience anticipated in familiarizing another contractor with the program.

FPR sec. 1-2.407-6 states in pertinent part that:

"(a) In furtherance of the small business and labor surplus area policies set forth in Subparts 1-1.7 and 1-1.3, award shall be made in accordance with the following order of priority when two or more low bids are equal in all respects (taking into consideration cost of transportation, cash discounts, and any other factors properly to be considered) * * *

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"(b) * * * If two or more bidders * * * remain equally eligible for award, award shall be made by a drawing by lot limited to such bidders. If time permits, the bidders involved shall be given an opportunity to be present at the drawing by lot. Such drawing shall be witnessed by at least three persons, and the contract file shall contain the names and addresses of those witnesses." (Underscoring supplied.)

(The subsection (a) lists eight small business and labor surplus preferences (not relevant here) in order of their priority.)

In our opinion, "other factors" as used in this regulation mean those criteria which are inherent in the solicitation but not those extraneous circumstances which may become significantly attractive to the procurement activity only because tie bids have been received. With regard to the instant procurement, we feel that the incumbent contractor's past performance cannot be considered in finding that these two similarly priced bids were unequal since past performance alone is an extraneous matter insofar as the bidding documents are concerned. To the extent that 37 Comp. Gen. 330 (1957) is inconsistent with this position, it no longer will be followed.

Award solely on the basis of the incumbent's experience clearly was therefore contrary to FPR sec. 1-2.407-6(b). The cited FPR section mandates a drawing where equal bids have been received. The failure in this instance to draw lots casts serious doubt on the propriety of the award to Berklay. We thus recommend that the agency review the procurement and

L-179380

now comply with the procedures of FPR sec. 1-2.407-6(b). If, after compliance with the procedures, Randy rather than Berklay is entitled to award, we trust that appropriate action will be instituted to terminate the contract with Berklay for the convenience of the Government and to award a contract for the remaining services to Randy.


Deputy Comptroller General
of the United States