

01207

DECISION



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

FILE: B-186679

DATE: October 7, 1976

MATTER OF: Euclid Designs & Development Co.

DIGEST:

1. GAO will consider protest under repurchase where repurchase is in excess of quantity under defaulted contract since entire quantity should be treated as new procurement pursuant to ASPR § 8-602.6(a) and (b).
2. Contrary to protester's allegations specifications and packaging instructions for nonmagnetic barbed tape are not ambiguous or deficient.
3. CAO will not question RFP which was sent to only one company where procurement is assigned priority designator 5 and record indicates only one company could meet required delivery schedule.
4. Failure of offeror to receive material amendment does not affect propriety of award since offeror was properly excluded from mailing list and there was no conscious or deliberate effort on part of contracting agency to exclude firm from competition.
5. Proposal received after scheduled closing date and not coming under one of the exceptions is late and not for consideration.

Euclid Designs and Development Co., Clark Division (Euclid), protests award of a contract under request for proposals (RFP) No. DSA700-76-R-1547, issued by the Defense Supply Agency (DSA), Columbus, Ohio, for the repurchase of barbed tape.

The original contract with Euclid had been terminated for default in accordance with Armed Services Procurement Regulation (ASPR) § 7-103.11 (1975 ed.). The authority for negotiation was 10 U.S.C. § 2304(a)(2) (1970), as implemented by ASPR § 3-202.2(vi).

The RFP was issued on May 18, 1976, for a total quantity of 2,134 reels of stainless steel, nonmagnetic barbed tape which was 32 units in excess of the undelivered quantity terminated for default.

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Where, as here, the repurchase is in excess of the quantity under the defaulted contract, the entire quantity shall be treated as a new procurement for the purposes of competition. ASPR § 8-602.6(a) and (b), supra. Therefore, we will review the procurement procedures with regard to the requirements of 10 U.S.C. § 2304(a) and the implementing ASPR provisions. Rotherm Corporation, et al., B-184855, January 28, 1976, 76-1 CPD 58. The fact that Euclid has appealed the termination for default of the original contract to the Armed Services Board of Contract Appeals does not affect the jurisdiction of our Office to hear the merits of the protest. The issue before the Board is whether the contract was properly terminated. Even if Euclid further appeals to the Board after excess costs have been assessed, the question then will be whether the Government properly mitigated damages or, even more basic, did the Government purchase "similar" items. On the other hand, our Office will review the actions of the contracting officer for compliance with the requirements for competition.

Euclid protests the reprourement by advancing the following contentions for cancellation of the RFP:

1. Irregularities in the specifications.
2. Failure to include protester on mailing list, which, in effect, resulted in a sole-source negotiation.
3. Advancement of closing date for receipt of proposals without providing Euclid notice.
4. Refusal by procuring agency to consider protester's proposal.

Amendment No. 0001 was issued on May 20, 1976, changing the closing date for receipt of proposals from June 1, 1976, to May 28, 1976. The record indicates that Euclid was not included on the mailing list for the RFP but obtained a copy on May 20, 1976. The contracting officer sent the amendment to the only company on the mailing list, Man Barrier Corporation (Man), which received and acknowledged the amendment. Since Euclid was not on the mailing list nor was there a letter of request from Euclid in the contract file, the amendment was not sent to Euclid.

Euclid's first allegation goes to the adequacy of the specification in the RFP. The RFP was for nonmagnetic barbed tape made from austenitic stainless steel. DSA noted that austenitic steel becomes slightly magnetic after cold working. Euclid contends that the degree of magnetism allowable should be specified. No tolerances were set up as the allowable magnetism would be that which results from rolling and splitting the steel plus the cold working to form the items required. Accordingly, we concur that the note does not have to define slightly magnetic as long as the steel used to produce the barbed tape is that which is called for in the specifications--namely, austenitic steel which is nonmagnetic.

Euclid next contends the National Stock Number (NSN) 5660-00-430-2804 needs clarification to indicate whether it covers one double coil assembly or one package of eight double coil assemblies accompanied with a retrieving tool, tent pins and wire ties. We have no difficulty in reading the RFP to reflect that NSN 5660-00-430-2804 refers to one double coil reel of stainless steel barbed tape.

Military specification MIL-B-52775A calls for packaging eight double coils to a pallet. Euclid points out that some destinations have quantities not divisible by eight. The answer to Euclid's quandary is simple. Those quantities less than eight will be packed on a separate pallet even though the quantity may be one coil. Additionally, all pallets will have one dispensing tool, and an appropriate number of tie wires and tent pins.

Paragraph 3.8 of MIL-B-52775A provides as follows:

"3.8 Wire ties. Twistable wire ties shall be fabricated from 16-gauge stainless steel wire with loops in each end (equivalent to McMaster-Carr Supply Company 2001-U tie wires)."

McMaster-Carr Supply Company 2001-U tie wires are unavailable in stainless steel. The record indicates that twistable wire ties as specified above are a common use item in the fencing or barrier business as well as in the packaging and crating operation of many industries. Although not offered in stainless steel, McMaster-Carr 2001-U is available in carbon steel. DSA points out that the item is available in stainless steel from the Mar Mac Manufacturing Co. Based on the above, we find no merit to the protester's challenge of the adequacy of the specifications.

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Secondly, Euclid states it was improperly excluded from the mailing list--the net effect of which was a sole-source procurement to Man. Although it is true that even in a negotiated procurement the applicable statute and regulation require competition, 10 U.S.C. § 2304(g) provides:

"In all negotiated procurements in excess of \$10,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals * * * shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured * * *." (Emphasis supplied.)

Thus, competition is required only where time of delivery will permit. Janke and Company, Incorporated, B-181064, August 29, 1974, 74-7 CPD 126.

The contracting officer had determined that Man was the only company eligible for waiver of first article testing and was then the only firm that could perform the contract within the required time constraints. In fact, Euclid in its initial protest with our Office indicated that "There are only three known capable producers in the field [for obstacle barbed tape]." Accordingly, only Man was sent a copy of the RFP which in essence resulted in a sole-source procurement to Man. Our Office will not question the contracting officer's decision to make a sole-source award unless it is clear from the written record that he acted in an unreasonable manner or in abuse of his discretion. Janke, supra. Based on the above, we cannot conclude that the contracting officer acted unreasonably in only sending an RFP to Man.

Thirdly, the fact that Euclid did not receive a copy of amendment 0001, which advanced the closing date, does not affect the propriety of the award.

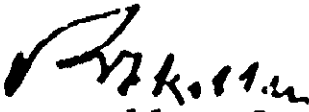
As stated above, Euclid was properly excluded from the mailing list. The amendment was not sent to Euclid as the contracting officer was not aware that Euclid had a copy of the RFP nor was there a letter of request in the contract file.

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Finally, Euclid protests the failure by DSA to consider its proposal. Clause C4, entitled "Late Proposals, Modifications of Proposals, and Withdrawals of Proposals," states that any proposal received after the closing date will not be considered with exceptions not relevant here. Euclid's proposal was not received until June 1, 1976. The closing date was May 28, 1976. Therefore, Euclid's proposal was properly excluded from consideration because of its receipt after the closing date.

Accordingly, the protest is denied.

Deputy


Comptroller General
of the United States