

PL-2

DECISION



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

10,468

FILE: B-193732

DATE: June 15, 1979

MATTER OF: Foreman Industries Inc.

[Protest of Air Force Solicitation]

DIGEST:

1. Protest alleging specification deficiencies which is filed after the closing date for receipt of proposals is untimely.
2. Contract awarded on basis of initial proposals without discussions is proper where solicitation notified offerors of such possibility and there was adequate competition resulting in a fair and reasonable price.
3. While contracting officer's oral authorization to successful offeror to begin performance prior to complete execution of contract is contrary to agency procedures, protester was not prejudiced thereby and award is not illegal.
4. Agency decision not to disclose information to protester pursuant to Freedom of Information Act request is not reviewable by GAO.
5. Complaint concerning awardee's alleged noncompliance with Affirmative Action and Equal Opportunity provisions of prior contract will not be reviewed by GAO where Department of Labor (DOL), which has primary responsibility in the area, found awardee to be "eligible for award" and protester is pursuing matter with DOL.

Foreman Industries Inc. (Foreman) protests the award of a contract to Bendix Field Engineering Corporation (Bendix) by the Department of the Air Force (Air Force) under request for proposals (RFP) No. F33601-78-R-9159.

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The RFP was issued on August 22, 1978. It solicited proposals to provide maintenance and repair services for 125 facilities at Wright-Patterson Air Force Base, Ohio. The amended closing date for receipt of initial proposals was October 30, 1978. The contract awarded to Bendix covers a base period of December 1, 1978, through September 30, 1979, and has two 12-month option periods.

Foreman has raised a number of grounds for protest which fall within 3 general categories. The first group of Foreman's objections relates to the solicitation. The second group pertains to the Air Force's conduct of the procurement. The last group concerns Bendix's performance under a prior contract.

We find part of the protest untimely and the remainder without merit for the following reasons.

With regard to the solicitation, Foreman contends that amendments which changed the model year of the vehicles to be used under the contract, changed requirements relating to a supervisory foreman and deleted various computer requirements were improper because they were made to accommodate the incumbent contractor, Bendix. In addition, Foreman objects to the evaluation factors listed in the RFP and also to the agency's failure to provide numerical point values for the evaluation criteria. Moreover, Foreman alleges that the wage determination included in the solicitation was incorrect.

The procedures which govern our consideration of bid protests require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals be filed prior to that closing date. 4 C.F.R. § 20.2(b)(1) (1978). While all of Foreman's objections to the solicitation were apparent before the closing date for receipt of proposals, Foreman first protested these alleged deficiencies on December 27, 1978, almost two months after the closing date. Consequently, this part of the protest is untimely and will not be considered on the merits. California Computer Products, Inc., B-193437, December 5, 1978, 78-2 CPD 391.

With regard to the conduct of the procurement, Foreman alleges that the solicitation was sent to the Bendix Launch Support Division, but the award was made to the Bendix Field Engineering Corporation. (In commenting upon Foreman's protest, Bendix has advised our Office that the Launch Support Division is now "essentially inactive" and that the Field Engineering Corporation responded to the RFP and was awarded the contract.) Foreman does not explain how this circumstance affects the legality of the award. We think it does not, and that this contention is without merit.

Next, Foreman objects to the "lack of good faith" exhibited by the contracting officer in not opening discussions in response to Foreman's request for "clarifications" made after the closing date.

In negotiated procurements, discussions are generally required to be conducted with offerors within a competitive range. One of the exceptions to this general requirement involves procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience that acceptance of the most favorable proposal would result in a fair and reasonable price and the solicitation notifies offerors that award might be made without discussions. Defense Acquisition Regulation (DAR) § 3-805.1(a) (1976 ed.).

In this regard, Section C of the solicitation notified all offerors that award might be made without discussions. The Air Force states that there was adequate competition in that three offers were received which were determined to be technically acceptable, and that it determined that Bendix's initial offer was for a fair and reasonable price. In addition, the Air Force notes, this procurement is essentially a follow-on of its previous procurement for the same services and that it had developed considerable cost experience data for these requirements.

The contracting officer must determine, under the circumstances of each case, whether a particular price offered is reasonable. Otis Elevator Company, B-190432,

March 15, 1978, 78-1 CPD 204. Our review is limited to the question of whether the contracting officer acted reasonably in making his determination. In this case, among the three proposals received, Bendix's was lowest in price. We believe there was adequate competition in the procurement and also that the agency was in a position to have accurate prior cost experience for these services. Accordingly, we think the regulatory requirements for adequate competition, price reasonableness and prior cost experience are satisfied and therefore can not object to the award on the basis of initial proposals. See Francis & Jackson, Associates, 54 Comp. Gen. 244 (1978), 78-1 CPD 79; SAI Comsystems Corporation, B-189407, December 19, 1977, 77-2 CPD 480.

Foreman next contends that the contract was awarded 15 days after the anticipated award date, that Bendix was working without an extension to its existing contract, and, in effect, a retroactive award was negotiated to cover that period. The Air Force reports that Bendix's prior contract was scheduled to expire on November 30, 1978, and that its current contract was executed by both the contracting officer and Bendix by November 22. However, the contract provided that it would not be binding upon the Government unless approved by a higher level within the agency. Because the agency needed continuous services so that research and development projects would not be interrupted, the contracting officer states he authorized Bendix to proceed working on December 1, 1978, under the terms of Bendix's offer. However, the contract was not formally approved until December 15.

The Air Force states that the contracting officer's oral authorization to Bendix to begin performance prior to complete execution of the contract is contrary to Air Force procedures and that its contract award and administrative functions are being reviewed "to assure actions are accomplished in an appropriate and timely manner." While Foreman objects to the contracting officer's action, it has not explained how this might affect the legality of the award or in any way prejudice Foreman. We think it does not, and that this contention too is without merit.

Foreman's next contention concerns the Air Force's refusal to furnish it information relating to Bendix's performance under the previous contract. Foreman requested such information under the Freedom of Information Act. However, we have no authority to determine what information must be disclosed by Government agencies under the Freedom of Information Act, and thus there is no basis for us to review the contracting agency's decision not to comply with Bendix's request. Unitron Incorporated, B-191273, July 5, 1978, 78-2 CPD 7.

Foreman's remaining objections relate to Bendix's performance under the prior contract. Foreman alleges that Bendix failed to comply with the affirmative action compliance and equal opportunity requirements (EEO) under its previous contract with the Air Force, and, therefore, pursuant to DAR 12-801(c), was not eligible for award. Foreman further alleges that no minority utilization reports were filed by Bendix and that no compliance reviews have been conducted.

The Air Force states that the appropriate compliance agency, the Office of Federal Contract Compliance Programs, Department of Labor, "determined that Bendix was eligible for award." Foreman also indicates it has protested these matters to the Department of Labor. Since the Air Force apparently was informed that there was no record of noncompliance on the part of Bendix, and since Foreman is taking up the matter with the Labor Department, which has primary responsibility in this area, we will not consider the matter further. See B-176684, October 2, 1972, Inflated Product Company, Inc., B-190877, May 11, 1978, 78-1 CPD 362.

The protest is denied in part and dismissed in part.


Deputy Comptroller General
of the United States