

DECISION



12203
PL-11
Mr. Weiskopf
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-194367

DATE: December 5, 1979

MATTER OF: Starlight Components, Inc.

DIGEST:

1. Where doubt exists as to when protester knew or should have known of basis for protest, doubt is resolved in favor of protester.
2. Arguments based on documents received pursuant to Freedom of Information Act are timely where raised within 10 days of receipt of such documents.
3. Where protest filed March 16 did not contain detailed protest grounds and GAO on March 22 requested detailed statement, protester's mailing of statement on March 28 was within time permitted by GAO Bid Protest Procedures for filing such statement.
4. Citation in D&F of "Issue Priority Designator 01 through 06" without detailed findings was sufficient to authorize negotiation under public exigency exception, 10 U.S.C. § 2304(a)(2), although GAO henceforth will require detailed findings in such D&Fs. Despite D&F, however, amendment requesting second round of offers and extending delivery schedule 60 days to enable agency to take advantage of one offeror's low price raises serious question as to whether urgency cited to justify negotiation actually existed.
5. Where preaward survey recommended award to offeror if delivery schedule was extended 60 days, agency amendment to RFP extending delivery schedule 60 days to take advantage of offeror's low price is proper. However, extension may be inconsistent with public exigency authority to negotiate.

1 D 5455

2 ———58

3 840

[Protest Against Contract Award]

007970 111013

6. Agency failure to incorporate items into existing D&F is matter of form rather than substance which does not constitute basis for protest since file contains purchase request carrying Issue Priority Designator 06 for such items and statement that contracting officer intended to include items in D&F.
7. Protest that awardee is incapable of performing contract raises matter of affirmative determination of responsibility which GAO does not review unless protester alleges either fraud by procuring officials or failure to apply definitive responsibility criteria.
8. DD Form 633, used to obtain cost and pricing data from contractor, is not required where negotiated price is based on adequate price competition.
9. Protest that awardee ~~might be buying in is not proper basis to challenge award.~~
10. GAO will not consider protester's mere speculation ~~that certain improprieties may have occurred.~~

2
3
Starlight Components, Inc. (Starlight), filed a protest with this Office on March 15, 1979, concerning the March 9 award of a contract to General Aero Products Corp. (General Aero) under RFP DAAA09-79-R-2006, issued by the Army Armament Materiel Readiness Command, Rock Island, Illinois. The solicitation was issued on November 21, 1978, for 99 hand grip assemblies. The procurement was negotiated pursuant to 10 U.S.C. § 2304(a)(2) (1976), which authorizes negotiation if the public exigency will not permit the delay incident to formal advertising. 810

The record shows that after the submission of initial proposals on January 4, 1979, General Aero was the low offeror at a price of \$284,625; Starlight was second low. Five other offers also were received. The contracting officer, apparently considering award to General Aero on the basis of its initial proposal, requested a preaward survey of General Aero. The industrial specialist who conducted the survey rated General Aero unsatisfactory in four of nine factors investigated. Based upon these negative findings, the survey report recommended no award to General Aero under the delivery schedule set forth in the RFP. However, the industrial specialist indicated that General Aero would be able to perform the contract if the delivery schedule, which required a first article test report in 180 days and delivery of 42 units in 270 days and of 57 units in 300 days, was extended 60 days. Thereafter, by letter dated February 9, 1979, the contracting officer extended the delivery schedule 60 days and set February 20 as the date for submission of best and final offers.

Upon submission of best and final offers, a Board of Review (Board), which reviews the procuring activity's procurements of \$100,000 or more, considered the procurement file and on March 9 recommended award to General Aero.

Starlight's original protest was filed by mailgram received on March 15 which listed several alleged improprieties in the procurement. In a later mailgram, received in this Office on March 16, Starlight stated that its original protest contained erroneous information and that details would follow. We notified the protester on March 22 that we required an additional statement detailing the specific grounds for protest. The ensuing detailed letter, dated March 26, raised the following bases for protest:

(1) The determination and findings (D&F) justifying negotiation does not clearly and convincingly establish that the use of formal advertising would not have been feasible and practical.

(2) The amendment of the solicitation extending the delivery schedule 60 days was improper, since the purpose of the amendment was to allow General Aero to overcome the negative findings of the pre-award survey.

(3) The Army failed to perform a proper investigation to confirm the protester's allegations that General Aero cannot perform the contract.

(4) When the Army received General Aero's offer, the Army should have required a DD Form 633 cost statement to insure that General Aero's low offer was realistic.

(5) General Aero might be buying in.

By letter filed in this Office on April 13, Starlight raised additional grounds for its protest based on material it obtained from the Army pursuant to the Freedom of Information Act (FOIA). Of most significance, Starlight, expanding upon its allegations regarding the impropriety of the D&F, alleged that it does not justify negotiation for the full number of grip assemblies required in the solicitation. The solicitation calls for 99 grip assemblies, whereas the D&F cites an urgent need for only 57.

Finally, the Army contends that all of the allegations raised for the first time in Starlight's March 26 letter are untimely, presumably because they were not furnished to this Office within the time limitation for submitting details. We disagree. We view Starlight's initial protest filed on March 15 as superseded by the mailgram received on March 16. On March 22 we requested the protester to provide us with a detailed statement of the grounds of protest, and the protester replied with its letter dated March 26 and mailed March 28. Since the statement was mailed within 5 working days after we requested it, the statement was submitted within the time permitted by our Bid Protest Procedures. 4 C.F.R. 20.2(d); see California National Air Service, B-189343, September 12, 1977, 77-2 CPD 185.

Propriety of D&F and Amendment

Starlight contends that the D&F does not clearly and convincingly establish that the use of formal advertising would not have been feasible and practical. The D&F cites the grip assemblies as the subject of an 02 "Issue Priority Designator" (IPD) and concludes that the public exigency will not permit the delay incident to formal advertising.

The provisions of Defense Acquisition Regulation (DAR) § 3-202.3 (1976 ed.) in effect when this procurement was conducted required that the contracting officer prepare and sign a D&F justifying negotiation, and further provided that the citation of an IPD of 01 through 06 in the D&F was sufficient to justify negotiation. Bristol Electronics, Inc., B-190341, August 16, 1978, 78-2 CPD 122. Because the use of IPD's without detailed facts and findings is subject to abuse, we recommended that DAR § 3-202.3 be amended to require detailed facts and findings in the future. Electrospace Systems, Inc., 58 Comp. Gen. 415 (1979), 79-1 CPD 264. The regulation has been appropriately revised. See Defense Acquisition Circular 76-20, September 17, 1979.

However, since the prior provision permitted negotiation pursuant to such a D&F without detailed findings, we indicated that we would not question awards made under such abbreviated D&Fs until the 1980 fiscal year. 58 Comp. Gen., supra., at 429. Consequently, we will not question this negotiated award merely because it did not contain detailed findings.

The Army's actions here, however, nonetheless raise some question as to the validity of the urgency determination. Despite the IPD, the Army, on the basis of the preaward survey of General Aero extended the delivery schedule 60 days and requested that revised proposals be submitted on February 20, more than six weeks after the closing date for submission of initial proposals. We have recognized that an agency may amend the delivery schedule after proposals are submitted to take advantage of a particular offeror's terms as long as the other offerors are allowed to respond to the change. See Alton Iron Works, Inc., B-179212, March 6, 1974, 74-1 CPD 121. We have also held that an agency may amend an RFP after the submission of proposals to effect the most economical method of procuring the items. Jones & Guerrero Co., Incorporated, B-192328, October 23, 1978, 78-2 CPD 296. Thus, we find nothing objectionable per se with the delivery schedule extension.

However, since it appears that the sole purpose of the 60-day extension was to obtain the benefit of General Aero's lower price, it does raise a serious question as to the actual urgency of the procurement. We are unable to reach any conclusions concerning this matter because the reasons underlying the urgency determination are not on the record. We are, however, bringing this matter to the attention of the Secretary of the Army and reminding him that the use of abbreviated D&Fs such as was relied here is no longer permitted.

Starlight also alleges that the D&F fails to list the full number of grip assemblies being procured. The Army admits that the D&F does not refer to 42 of the assemblies being procured. However, the agency explains at the time the contracting officer executed the D&F he had on hand both a purchase request for 57 assemblies and another purchase request, citing IPD 06, for the additional assemblies, but that through an administrative oversight the additional assemblies were not cited in the D&F. The Army contends that the omission does not affect the authority to negotiate, and we agree.

Since the contract file contains a purchase request citing IPD 06 for the 42 assemblies and a statement that the contracting officer intended to include the 42 assemblies in the D&F, the circumstances necessary to permit negotiation under the public exigency exception are present. We believe the Army's failure to incorporate the 42 assemblies into the D&F is a matter of form rather than substance which does not constitute a basis for sustaining a protest. See Electronic Composition, Inc., B-186755, February 15, 1977, 77-1 CPD 109.

General Aero's Responsibility

Starlight's contention that General Aero is not capable of performing the contract and that the Army would have so determined if a proper investigation was conducted constitutes a protest against the Army's affirmative determination of General Aero's responsibility. We do not review protests against affirmative determinations of responsibility unless the protester alleges either fraud on the part of the procuring officials or that the solicitation contains definitive responsibility criteria which have not been applied. See Bogue Electric Manufacturing Company, B-194222, June 18, 1979, 79-1 CPD 431. Since neither is applicable here, we will not consider this aspect of Starlight's protest. We note, however, that we requested and received a copy of the minutes of the Board meeting which indicate that before recommending award to General Aero the Board reviewed the preaward survey and Starlight's allegations of General Aero's lack of capability.

Failure to Require DD Form 633

Starlight insists that the Army should have received a DD Form 633 to ensure the realism of General Aero's price. DD Form 633 (Contract Pricing Proposal) is used to obtain cost and pricing data from the contractor in accordance with the Truth in Negotiation Act, 10 U.S.C. § 2306(f) (1976). However, such data is not required where the price negotiated is based on adequate price competition. Serv-Air, Inc., 57 Comp. Gen. 827, 834-838, (1978), 78-2 CPD 223, affirmed on reconsideration, 58 Comp. Gen. 362 (1979), 79-1 CPD 212. Generally, adequate price competition exists where more than one offeror is considered to be within the competitive range and price

is substantial, though not necessarily determinative, factor in the prescribed evaluation criteria. Serv-Air, supra, at 836. It is clear that these conditions were present here, and that the contracting officer was not obligated to request cost and pricing data from General Aero.

Buying In

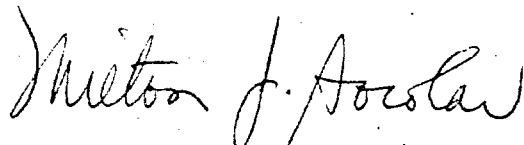
Starlight contends that General Aero is buying in to these procurements by offering to perform at a price below its costs.

We have consistently held that the possibility of a buy in, or the submission of a below-cost bid, is not a proper basis upon which to challenge an award. Harris Management Company, B-193049, May 30, 1979, 79-1 CPD 382; Bristol Electronics, Inc., supra. Such a determination was not made here. However, DAR § 1-311 (1976 ed.) cautions contracting officers to assure that amounts excluded in the development of the original contract price are not recovered in the pricing of change orders or follow-on procurements subject to cost analysis.

Conclusion

The remaining grounds for protest involve speculation that certain improprieties may have occurred without substantial allegations that any such improprieties in fact took place. We will not consider these aspects of the protest which involve mere speculation. See Technology, Inc., B-190534, November 16, 1977, 77-2 CPD 379.

Since we find the protester's other allegations to be without merit, the protest is denied. However, as indicated, we are bringing the lack of detailed findings in the D&F and the 60 day delivery schedule extension to the attention of the Secretary of the Army.



For The Comptroller General
of the United States