

DECISION



12511 PL-1
Mr. Egan
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-193278

DATE: January 14, 1980

MATTER OF: H. G. Fischer, Inc. DLG03608

DIGEST:

1. Protest filed within 10 days after agency debriefing where exact bases of protest were made known to protester is timely.
2. Procuring activity did not violate small business preference mandated by Congress by not awarding contract to small business when solicitation did not set aside procurement for small business concerns.
3. Procuring activity rejection of small business low offer for matters related to responsibility was for ultimate referral to Small Business Administration for issuance or denial of Certificate of Competency.
4. Despite deficiencies in procurement under schedule contracts--lack of support for substantial portion of using activity's objections to low offeror, and failure to advise or give low offeror opportunity to discuss technical requirements of using activity not in schedule contracts prior to award--award to second low offeror for x-ray equipment which included features satisfying legitimate need of using activity not on low offeror's equipment is unobjectionable.

The Veterans Administration (VA) informally solicited offers from VA decentralized schedule contractors for the procurement and installation of x-ray equipment for two rooms at the VA hospital at Fort Miley, San Francisco, California. On September 21, 1978, the VA awarded purchase orders to the Picker Corporation (Picker), the second low offeror. This action has been protested by

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the low offeror H. G. Fischer, Inc. (Fischer), a small business. To date, the equipment has not been delivered.

VA justifies the award to the second low offeror, as follows:

1. The cost of x-ray room modification for installing Fischer equipment more than equaled the price differential between Fischer and Picker.

2. Fischer neither satisfactorily installed comparable equipment nor demonstrated adequate service at any hospital in the San Francisco area. Fischer's service representatives in the San Francisco area do not have experience in servicing the Fischer units offered.

3. Since similar Picker equipment is already installed at the VA hospital, there would be cost and time savings by having common replacement parts.

4. Picker equipment is necessary to insure compatibility and continuity of service.

5. The technical capabilities of Fischer equipment are not adequate to provide for patient care needs. Also, it is impossible to tell from Fischer's proposal if its equipment has certain essential technical capabilities.

6. Picker has proven quality products and reliable service.

Finally, the VA contends that Fischer's protest is untimely, since Fischer knew on October 3, 1978, that award had been made to another firm at a higher price but it did not file a protest within 10 days.

Fischer's bases of protest follow:

1. The award violates the small business preference mandated by Congress.

2. Fischer was the low responsive, responsible offeror.

3. The VA's allegation that the cost of room renovation would more than equal the price differential between Fischer and Picker is unsupported by fact. The VA never documented the cost difference, and VA did not know the comparative installation cost difference when it awarded Picker the contract on September 21, 1978. Moreover, certain modifications will have to be made to the x-ray rooms regardless of whether Fischer or Picker equipment is installed, and the basic installation costs would be the same.

4. Fischer has an experienced service representative in the San Francisco area, and the references supplied by the service representative should have been but were not checked by the VA. The VA's statement that Fischer lacked a proven service record is irrelevant, speculative, unsupported in fact, and tends to perpetuate a monopoly in Picker equipment. In this regard, the VA in San Francisco recommended the purchase of Picker equipment a month before Fischer met with VA representatives to discuss the suitability of Fischer equipment, and the VA conducted discussions with Fischer, even after award had been made to Picker.

5. The replacement parts matter is of no consequence since the schedule contract imposes adequate responsibilities on the contractor.

6. The lack of compatability argument is specious, since the new equipment would not be attached to any existing equipment.

7. Fischer equipment is adequate for patient health care and its proposal met every facet of the VA's schedule contract purchase description. Some of the alleged technical deficiencies of Fischer equipment are not included in that purchase description.

As for timeliness, the record indicates that Fischer knew on October 3, 1978, only that award had been made to a higher priced offeror but Fischer did not know the agency's rationale until it was debriefed on October 13, 1978. Since the protest was filed with our Office within 10 days, it is timely. See 4 C.F.R § 20.2(b)(2) (1978).

We agree with the VA that award to Picker did not violate the small business preference mandated by Congress since the procurement was not set aside for small business concerns.

Based on the record before us, the VA's contention that the installation cost of Fischer equipment would eliminate the price differential is a speculative assumption which was never documented by the using activity. The matters of prior installation and ability to service equipment impact on responsibility for ultimate referral to the Small Business Administration for the issuance or denial of a Certificate of Competency. Old Hickory Services, B-192906.2, February 9, 1979, 79-1 CPD 92. Further, we see nothing in the record which indicates that Fischer equipment would be incompatible, that it would not provide for continuity of service, or that there would be any savings realized by having common replacement parts.

This lack of support for a substantial portion of the VA's justification coupled with the following history of the procurement causes us concern. The using activity had requested a sole-source contract with Picker. Instead of soliciting sole source from Picker, the contracting officer solicited offers from the seven firms which held schedule contracts and Fischer was low. Among other things, including some of those VA now raises, the using activity justified award to Picker based on continuity of service and equipment compatibility. The contracting officer accepted only these justifications and awarded the contract to Picker. However, when the using activity failed to adequately support any of its justifications, the contracting officer recommended cancellation of the purchase

orders and award to Fischer. Months later, the VA using activity set forth various alleged technical deficiencies of the Fischer equipment. Fischer submitted detailed rebuttals to the VA's allegations.

The VA, for example, states that certain technical characteristics were not included in Fischer's offer concerning the adequacy of the contractor's generator, and other technical deficiencies. Fischer, on the other hand, contends that its equipment is satisfactory for general radiography, as required by the VA hospital in San Francisco, and its proposal satisfied VA's schedule purchase description. Also, if the aforementioned technical capabilities were considered so important by the VA, they should have been included in the VA's purchase description and not raised until over a year after the schedule contracts were awarded.

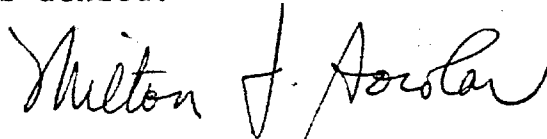
These technical issues may not have arisen if Fischer had been advised of and given an adequate or timely opportunity to discuss the technical capabilities required by the using activity not in the schedule contracts before any award was made. However, this apparently was not done, since the record reflects that technical discussions were held with Fischer after the contract had been awarded.

Nevertheless, we have consistently held that a procuring activity should buy off of a schedule contract the lowest priced item which satisfies its legitimate needs. Dictaphone Corporation, B-192318, January 25, 1979, 79-1 CPD 49. We have taken this position even where, as here, the schedule's purchase description did not completely set forth all of a particular using activity's legitimate needs. McClane Enterprises, B-192242, September 25, 1978, 78-2 CPD 227, affirmed McClane Enterprises--Reconsideration, B-192242, July 9, 1979, 79-2 CPD 15; Quest Electronics, B-193541, March 27, 1979, 79-1 CPD 205.

In the instant case, it appears that Picker was selected because the Picker x-ray equipment had certain features which were not set out in the purchase description and which the VA deemed essential, i.e., phototiming mechanism, mechanical contactors, forced extinction capability, and separate time and MA selectors. It also appears that the Fischer equipment lacked these features.

Because of this, despite the deficiencies in the procurement, we cannot object to the VA's award to Picker. However, by letter of today, we are bringing the above deficiencies to the attention of the Administrator of Veterans Affairs.

The protest is denied.

A handwritten signature in dark ink, reading "Milton J. Aorola". The signature is fluid and cursive, with the first name "Milton" being the most prominent.

For The Comptroller General
of the United States