

DECISION

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

118908

FILE: B-205533

DATE: July 8, 1982

MATTER OF: E.C. Campbell, Inc.

DIGEST:

1. Contracting agency's approval, in the first step of a two-step formally advertised procurement, of a technical proposal not meeting a mandatory requirement for special tools to manually operate an information retrieval system was improper; the agency established a firm requirement for such tools, and the decision to relax that requirement for one offeror constituted a basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that bids be resolicited on the basis of the Government's current minimum needs.
2. Protest based on information disclosed to the protester in an agency report on an earlier protest is timely where filed in GAO approximately three weeks after the report was issued, and it is unclear exactly when the protester received the report; it is GAO's practice to resolve doubts as to timeliness in favor of the protester.

E.C. Campbell, Inc. protests the award of any contract under invitation for bids (IFB) No. DLA004-81-B-0043, the second step of a two-step formally advertised procurement conducted by the Defense Logistics Agency (DLA) to acquire an Automated Storage and Retrieval Order Picking System. Bids under this IFB were to be based on the bidders' own technical proposals submitted in response to request for technical proposals (RFTP) No. DLA004-81-T-0001, step one of the two-step procurement. E.C. Campbell challenges the potential award to White Machine Company, the apparent low bidder, on the grounds that DLA failed to evaluate certain maintenance aspects of the technical proposals,

and improperly waived certain technical requirements for White without advising the other offerors that its minimum needs had changed. We sustain the protest on this latter ground.

Three firms--E.C. Campbell, White and Z-Loda Corporation--submitted proposals under the RFTP prior to the July 24 closing date. Immediately after the proposals were opened, they were forwarded to the project engineer for technical evaluation. At some time during the evaluation, it apparently was decided that the systems offered should be equipped with "special tools" (i.e. handcranks) for manual operation. White and E.C. Campbell were advised of this added requirement in letters dated August 10 and August 12, respectively, which afforded the offerors an opportunity to clarify any apparent deficiencies in their proposals. The relevant portion of these letters read as follows:

"The contractor shall furnish any special tools required to manually operate the carousels during commercial power outages. One set of these special tools shall be furnished for 50 per cent of the carousels installed."

In its August 21 letter responding to DLA, E.C. Campbell agreed to the added requirement, stating in pertinent part that:

"One set of special tools for 50 percent of the carousels installed will be furnished to manually operate the carousels during commercial power outages."

By letter dated August 27, White advised DLA that it would not comply with the special tools requirement, stating as follows:

"You request that we provide special tools to manually operate carousels during commercial power outages. We do not have any such tools available, (as we have found that they are not a feasible solution to manual operation should you not have the power brought to the carousel drive unit).

"We have available the ability to disconnect the drive package from the bin section and you might be able to rotate the bins manually, but since your layout allows you to manually pick between carousels, we feel that would be far more feasible an operating method than a special tool to turn the carousels manually during your commercial power outages.

"In any case, we are unable to comply with your request. * * *,"

By determination dated August 31, the project engineer concluded that all three proposals, as clarified, were technically acceptable. Thus, on September 18, the step-two IFB was issued to the three offerors, who were to submit bids on their own acceptable systems. The bids submitted by the October 2 bid opening date were as follows:

White	\$588,553
E.C. Campbell	\$589,241 ¹
Z-Loda	\$1,500,000

E.C. Campbell timely protested to our Office on November 18, based on information received from DLA on November 16 pursuant to a Freedom of Information Act (FOIA) request. This initial protest alleged that DLA had failed to evaluate the technical proposals for "ease and simplicity of equipment maintainability," one of the evaluation criteria set forth in the RFTP. On January 5, 1982, DLA issued its administrative report refuting this allegation. DLA's August 10 letter and White's August 27 letter clarifying its technical proposal were included as attachments to the report. DLA considered these letters confidential since they dealt with White's technical approach, and therefore intended to omit them from E.C. Campbell's copy of the report. By apparent administrative oversight, however, the letters were included with E.C. Campbell's copy of the report.

In its January 25 comments on the report, E.C. Campbell alleged for the first time that White's technical proposal should not have been deemed

¹ This price takes into account an offered 1/2 percent discount for payment made within 20 days.

acceptable since White had not adequately responded to the requests in DLA's August 10 letter. E.C. Campbell takes the position that acceptance of White's deficient technical proposal constituted a waiver of several technical requirements, including the added requirement for special tools for manual operation. It concludes that DLA did not treat all bidders equally, and that the procurement therefore was fatally defective. DLA responds that White's August 27 letter was found sufficient to render its technical proposal acceptable in all respects. Award has been delayed pending the outcome of this protest.

As a preliminary matter, DLA and White have questioned the timeliness of this protest. We find that E.C. Campbell's allegations concerning unequal treatment of bidders were timely raised. Under our Bid Protest Procedures, protests must be filed no later than 10 working days after the basis for protest was known or should have been known. 4 C.F.R. § 21.2(b)(2). E.C. Campbell's allegations are based entirely on the information contained in DLA's August 10 letter to White and White's August 27 response. E.C. Campbell did not receive these letters until sometime after January 5, 1982, the date DLA's report was issued. E.C. Campbell raised its allegations on January 27, the day its January 25 comments on the report were received in our Office. While the record does not establish the exact date E.C. Campbell received the report (the starting date for the 10 day timeliness period), it is our practice to resolve doubts regarding timeliness in favor of the protester in situations such as this. Kentucky Building Maintenance, Inc., B-203206, October 9, 1981, 81-2 CPD 293. Accordingly, we will consider these allegations on the merits.

Two-step formal advertising is a hybrid method of procurement, combining the benefits of competitive advertising with the flexibility of negotiation. The first-step procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held, and revised proposals may be submitted. The second step is conducted in accordance with formal advertising procedures, each firm bidding on its own technical proposal. See Defense Acquisition Regulation (DAR) § 2-502. The step-one negotiation procedures do not require that technical proposals comply with every detail

of the specifications, but proposals must satisfy the Government's basic or essential requirements. 53 Comp. Gen. 47 (1973). If a technical proposal represents a basic change in the Government's essential requirements, it can be accepted only if the agency informs the other offerors of the change and affords them an opportunity to submit revised proposals based on the changed requirements. Baird Corporation, B-193261, June 19, 1979, 79-1 CPD 435. This reflects the fundamental federal procurement principle that all offerors must be treated fairly and equally so as to promote full and free competition. RCA Corporation; Norman R. Selinger & Associates, Inc., 57 Comp. Gen. 809 (1978), 78-2 CPD 213.

We believe DLA failed to treat all bidders fairly and equally here. Both White and E.C. Campbell initially proposed systems without special tools for manual operation. After being advised that the contractor "shall furnish" special tools, E.C. Campbell revised its proposal to add these tools, and then bid on a system with this equipment. White, on the other hand, refused to offer special tools, explaining instead that manual retrieval of information could most efficiently be achieved if the operator moved from carousel to carousel. DLA apparently agreed that this method would be effective and thus allowed White to bid on its proposal without offering special tools.

In permitting White to bid on a system without special tools, DLA in effect reduced its mandatory requirements and, as stated above, was required to inform E.C. Campbell and Z-Loda of the change before accepting White's bid. By failing to do so, it prevented all bidders from bidding on the same requirements and thus placed bidders on an unequal footing. Since E.C. Campbell values its special tools at more than \$1,400 and its bid as submitted was only \$688 higher than White's, it clearly is conceivable that E.C. Campbell would have been the low bidder had it been informed of the elimination of the special tools requirement. We therefore sustain the protest on this ground.

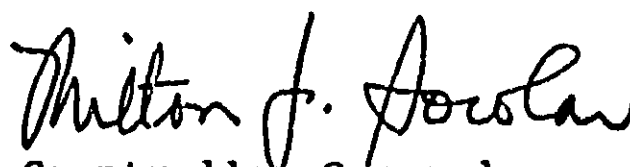
White contends that, according to its files, it was never released from the special tool requirement and that, notwithstanding its statements in its August 27 letter

to DLA, its bid did include the cost of these tools. This contention is unsupported by the record. We find no indication that White ever agreed to furnish special tools after taking exception to this requirement in its August 27 letter. DLA is silent on this point. Neither is there any evidence that White's bid included the cost of special tools. To the contrary, the bid schedule issued to White under step-two incorporated by reference two drawings--W81-026 and W81-026 (revised)--and White's original technical proposal, as revised by its August 27 letter. Inasmuch as White's revised proposal expressly states that it will not furnish special tools with its system, we find no basis for concluding that White included the cost of these tools in its bid price.

In view of our conclusion that DLA failed to treat all bidders equally here, E.C. Campbell's allegation that DLA improperly evaluated the technical proposals is academic and need not be considered.

By letter of today, we are recommending to the Director of DLA that bids be resolicited on the basis of the Government's current minimum needs. See Standard Conveyor Company; Rohr Industrial Systems, Inc., 56 Comp. Gen. 454 (1977), 77-1 CPD 220.

The protest is sustained.



Acting Comptroller General
of the United States