

DECISION

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

87
28191

FILE: B-213356

DATE: May 7, 1984

MATTER OF: Porta-Fab Corporation

DIGEST:

1. Contracting agency is authorized to conduct an oral solicitation where urgent need for requirement does not permit the delay attendant to the processing of a written solicitation. By necessary implication, oral amendments to a written solicitation, even if not subsequently confirmed, are also authorized where exigent circumstances will not permit any delay.
2. Where contracting agency solicits quotes orally, misunderstandings are likely to arise. Therefore, misunderstandings concerning oral solicitation terms do not establish a valid basis for protest unless the protester shows that it was intentionally misled by contracting personnel or that use of an oral solicitation was unreasonable under the circumstances.

Porta-Fab Corporation protests the Department of the Air Force's issuance of a delivery order to Endure-A-Lifetime Products, Inc. (EAL) for the purchase of a prefabricated two story structure and associated items for use as an additional maintenance facility at Edwards Air Force Base, California, under the General Services Administration (GSA) Federal Supply Schedule (FSS). Porta-Fab contends that it has FSS-listed products which could meet the Air Force's needs at a lower price than will EAL, but that the Air Force failed to disclose material changes in its requirements when soliciting quotations. We deny the protest.

The Air Force states that the structure was urgently required to relocate certain base maintenance personnel. In view of the limited time available, the contracting officer decided to purchase the structure from FSS contractors even though the Air Force is a non-mandatory user of the FSS for this class of items. As a result, on September 21, 1983, the Air Force issued a request for

028792

quotations (RFQ), containing technical specifications for the structure, to three firms which the Air Force believed held FSS contracts: Phoenix-E, Inc. (Porta-Fab's agent), EAL, and National Partitions, Inc.

On September 22, Phoenix-E and EAL submitted quotes for the structure; National Partitions was eliminated from the competition by the Air Force because its FSS contract had expired. Upon evaluation of the quotes received, the Air Force found that neither quoter had all necessary items of the structure covered by its respective FSS contract. In fact, the extent of FSS coverage reflected in the quotes varied so widely between Phoenix-E and EAL that the Air Force requested a detailed explanation of Phoenix-E's charges since its quote contained the greatest number of non-FSS items. Upon receipt of this information, the Air Force, unsatisfied with Phoenix-E's explanation of its charges for the non-FSS items, decided that it would be in its best interest to acquire only items covered in full by each quoter's FSS contract. The Air Force thereafter revised its requirements, determined that the RFQ's specifications exceeded its minimum requirements, and decided to extract all non-FSS items from the scope of the RFQ after determining that FSS items alone would adequately meet its needs.

The contracting officer states that on three separate occasions before the September 28 closing date she orally informed Phoenix-E that the Air Force had revised its requirements; that the RFQ's specifications were no longer operative or applicable and did not reflect the agency's minimum needs; and that Phoenix-E should submit a quote based solely on its standard commercial items wholly covered by its GSA contract. Phoenix-E and EAL thereafter submitted timely quotes. On September 30, the Air Force issued a delivery order to EAL which had submitted the lower quote.

Porta-Fab initially protested to the Air Force and subsequently to our Office that, based on all available technical literature, EAL should not have been issued the delivery order because its item does not comply with the RFQ's specifications. Porta-Fab further complained that if EAL's item, as purchased, meets the Air Force's requirements, it should also have been permitted to quote on the "relaxed" specifications reflected by the issuance of the delivery order to EAL for that item. Upon receipt of the agency report on its protest, Porta-Fab contended for the

first time that, contrary to the statement of the contracting officer, it never received notice, orally or otherwise, of the Air Force's revised requirements and its abandonment of the RFQ's original specifications. Consequently, Porta-Fab asserts that it was misled into quoting on its highest quality product to meet the specifications instead of quoting its lower priced FSS products which were available under its GSA contract. Finally, Porta-Fab argues that, irrespective of any notification, the alleged oral modification by the Air Force constituted an improper procurement procedure which seriously prejudiced its interests.

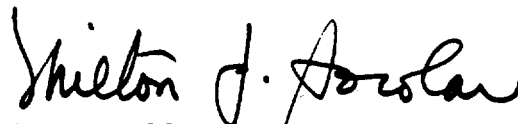
The Air Force initially contends that Porta-Fab is not an interested party eligible to protest under our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1983), because Porta-Fab is only a potential subcontractor/supplier which did not directly participate in the procurement. However, based on the record before us, we consider Porta-Fab to be an interested party. According to Porta-Fab, Phoenix-E, the nominal quoter, is merely an authorized agent and West Coast distributor of Porta-Fab's products and is not a party to any GSA FSS contract. As such, Phoenix-E submitted its quote solely on behalf of Porta-Fab, the FSS contractor. Under the circumstances, we think that Porta-Fab has a direct and substantial economic interest sufficient to support its status as an interested party. See National Office Systems, Inc., B-201133, March 18, 1981, 81-I CPD 210.

We agree with Porta-Fab that to the extent that the Air Force decided to involve Porta-Fab and EAL in the selection process, it was obligated to treat them fairly and equally. See Dictaphone Corporation, B-193614, June 13, 1979, 79-I CPD 416. Further, an agency must provide all quoters with an adequate statement of its needs. See Lanier Business Products, Inc., B-195346, October 22, 1979, 79-2 CPD 275. We also agree with Porta-Fab that an oral change or modification to a solicitation should usually be followed by a written amendment verifying the oral advice previously given. See Informatics, Inc., et al., 56 Comp. Gen. 388 (1977), 77-I CPD 152. In this connection, we have held that an agency's failure to issue a written amendment confirming prior oral advice given to offerors constitutes a prejudicial procedural defect where an offeror denies having been orally advised of the agency's changed requirements. Id.

Here, in support of its position, Porta-Fab has submitted an affidavit from the sole proprietor of Phoenix-E and an affidavit from one of its own corporate officers to the effect that the Air Force failed to advise the firm or its agent, Phoenix-E, of the specification change to the solicitation. The contracting officer has submitted a signed statement to our Office in which she unequivocally asserts that she orally advised Phoenix-E of the specification change on three separate occasions. Obviously, we are not in a position to resolve this factual dispute. However, it is undisputed that the structure being procured was urgently required on an emergency basis and that the entire procurement was expeditiously conducted in a matter of days. Under the circumstances, we think that Defense Acquisition Regulation § 3-501(d)(ii), which authorizes oral solicitations "where the processing of a written solicitation would delay the furnishing of supplies or services to the detriment of the government," also, by necessary implication, authorizes oral amendments to a solicitation where any delay attendant to the processing of usual written confirmations is unacceptable. In our opinion, since the exigency has not been questioned, the present circumstances fall within the reach of this regulation and therefore the agency's oral notifications, even without written confirmation, have not been shown to be procedurally improper.

Further, based on the record before us, there obviously appear to have been misunderstandings between Phoenix-E and the Air Force. While unfortunate, misunderstandings are likely to result when quotations are solicited orally. That a misunderstanding arises does not, in our view, establish a valid basis for protest unless the protester can allege and prove that it was intentionally misled by contracting personnel or that use of an oral solicitation was unreasonable in the circumstances. See PSI-TRAN Corporaton, B-195014, October 26, 1979, 79-2 CPD 296. Porta-Fab's allegation and proof do not meet this standard.

Therefore, the protest is denied.



Acting Comptroller General
of the United States