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

FILE: B-214287.2 **DATE:** June 18, 1984

MATTER OF: Windham Power Lifts, Inc./ Quality Plus Equipment, Inc.--Request for Reconsideration

DIGEST: Decision holding that agency determinations to (1) award negotiated contract after discussions; (2) expedite contract award process to take advantage of alternate low offer with 30-day acceptance limit; and (3) refuse to accept late offer that would have displaced previous low offeror were proper is affirmed where protester has not shown that there was an error of law or fact in the decision.

Windham Power Lifts, Inc./Quality Plus Equipment, Inc. (Windham/Quality), requests reconsideration of our decision in Windham Power Lifts, Inc./Quality Plus Equipment, Inc., B-214287, March 7, 1984, 84-1 CPD 278, summarily denying its protest of the award of a contract to PSI under request for proposals No. FD2060-83-58432, issued by the United States Air Force (Air Force).

We affirm our decision.

Windham/Quality claims that our decision "ignores the facts as presented and fails to address the issues actually raised."

Because it was a summary denial, our decision was based on only the issues and facts presented in Windham/Quality's initial letter of protest. While that letter was inartfully worded, we believe that our decision accurately reflects the facts and issues presented in that letter and, in fact, Windham/Quality's request for reconsideration confirms that belief. In our decision, we found that Windham/Quality had raised three issues: (1) that the Air Force had not awarded the contract based on initial proposals, which would have resulted in an award to Windham/Quality, since its initial price was lower; (2) that the Air Force hurried its contract award process to take advantage of a price that made PSI the low offeror--an alternate offer which required that award be made within 30 days of the date for best and final offers;

and (3) that, in contravention of Defense Acquisition Regulation (DAR) § 7-2002.4(e), reprinted in 32 C.F.R. pts. 1-39, Vol. II (1983), the Air Force refused to consider a post-best-and-final offer from Windham/Quality that would have made it the low offeror.

Windham/Quality now states that it was never its position that the contract should have been awarded on an initial proposal basis. However, in its initial letter of protest Windham/Quality stated:

> ". . . [i]nstead of awarding the contract on the basis of two valid competitive proposals - including our low bid, the government elected to reopen negotiations and allowed modifications to correct discrepancies." (Emphasis supplied by protester.)

Again, in its request for reconsideration, Windham/Quality states:

> ". . . the ultimate paradox is the factor that Quality's original bid--without need of modification--was most advantageous to the government . . . ."

We think that these statements clearly raise the issue addressed by our decision. Windham/Quality has not questioned our answer to that issue.

Windham/Quality states that our decision concerning the hurried award process completely obfuscates the original premise raised by it. We felt that the protester had raised the issue that the Air Force had hurried the award process in order to take advantage of an alternate offer by PSI that required award to be made within 30 days of best and final offers. We found that there was no requirement that the agency wait for a certain period of time before making award, and that Windham/Quality had not cited such a requirement.

It is our opinion that our decision accurately stated the issue raised and answered it correctly. For example, in its initial protest, Windham/Quality stated that:

> "Instead of utilizing normal bid review procedures at HQ, AFLC in this instance, all review was done by telephone and on a 'walk thru basis.' Careful informal investigation reflects that 'walk thru' approvals are utilized under extremely rare circumstances, if ever. We were not given an opportunity to participate in this footrace, and lost the bid."

As we stated, Windham/Quality did not provide a citation in support of its argument.

Windham/Quality now argues that Warner Robins Air Force Base internal contracting procedures permit emergency contracting procedures only for limited circumstances, none of which apply here. However, whether that is correct or not, we have held that internal agency rules and regulations do not have the force and effect of law, and their violation provides no basis for questioning the legality of the award here. See, e.g., West Coast Fire Service, Inc.--Reconsideration, B-211484.2, March 20, 1984, 84-1 CPD 328.

Windham/Quality also complains that the expedited processing of PSI's favorable offer for award was done in a clandestine manner which prevented other offerors from competing in the same way. Windham/Quality is confused concerning the nature of the competition. The competition for the contract was completed on the date for submission of best and final offers. What occurred between PSI and the Air Force after that was the administrative processing of the apparently successful offer which culminated in the actual award of a contract. There is no reason that any other offeror should have been involved in that process, since the competition was over. If Windham/Quality had wanted to offer an alternate proposal requiring award within the 30-day period or any other period, it was required to do so by the date of best and final offers.

Finally, Windham/Quality argues that our interpretation of the meaning of DAR § 7-2002.4(e) "flies in the face of the realities of the business world." That section provides that the government may accept a late proposal modification from the otherwise successful offeror, which makes the terms of that offer more favorable to the government. Our

decision found that the provision permitted the government to accept a late, more favorable offer from the offeror that has been selected for award. Windham/Quality argues that the provision requires the government to accept a late offer from any offeror whose proposal meets the technical specifications, if that offer is lower than the previous low offer.

In our decision, we cited a prior GAO decision supporting our interpretation of the provision. Windham/Quality has neither attacked that legal authority nor provided legal authority in support of its own interpretation. In addition, Windham/Quality's interpretation is in direct opposition to fundamental principles of competitive negotiation. One of the basic requirements of competitive negotiation is that there be a common cutoff date for the submission of best and final offers, so that all offerors are competing on an equal footing. DAR, § 3-805.3(d). If an agency reopens negotiations with one offeror after the best and final date, it is required to reopen negotiations with all offerors in the competitive range. John Fluke Manufacturing Company, Inc., B-195091, November 20, 1979, 79-2 CPD 367. The acceptance of a new price/cost offer constitutes reopening negotiations. B-174492, June 1, 1972. Consequently, an agency cannot accept a late offer that displaces the apparent awardee and then award to the new low offeror. Rather, if it accepted such an offer, it would be required to reopen negotiations with all offerors and request a new round of best and final offers.

The DAR section in question is intended to permit the government to benefit from a late lower offer from the apparent awardee. A new round of best and final offers is not required in these circumstances because none of the other offerors is prejudiced. Award will still be made to the offeror that would have been the awardee based on best and final offers. Windham/Quality seems to think that this is an illogical interpretation because presumably no offeror that had already won would lower its price. However, these situations generally occur when offerors make last-minute reductions that are intended to be received by the agency on time, but are late. The offeror that was already low is unaware of that fact and submits an inadvertently late price reduction in an attempt to win the competition.

In summary, Windham/Quality has not shown that there was an error of law or fact in our decision.

Our decision is affirmed.

Milton J. Socolar
for Comptroller General
of the United States