

30133

DECISION



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

FILE: B-216199

DATE: January 3, 1985

MATTER OF: Right Away Foods Corporation

DIGEST:

Agency may delay a contract award and request bid extensions to allow low bidders time to obtain the United States Department of Agriculture approval of their plants which was required for contract performance.

Right Away Foods Corporation (RAFCO), protests the award of a contract to Oregon Freeze Dry Foods, Inc. (Oregon) and the proposed award of a contract to Ontario Food Products, Inc. (Ontario) under invitation for bids (IFB) No. DLA13H-84-B-8797, issued by the Defense Logistics Agency, Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania, for dehydrated cottage cheese. RAFCO essentially contends that it was the only qualified bidder at the time of bid opening and it therefore should have been awarded these contracts.

We deny the protest.

The solicitation incorporated the military specification for dehydrated cottage cheese, MIL-C-43274C, which provided that in order for a firm to process dehydrated cottage cheese for sale to government and military agencies the firm's plant must operate under United States Department of Agriculture (USDA) regulations governing the grading and inspection of dairy products, be listed by the USDA in its publication entitled Dairy Plants Surveyed and Approved for USDA Grading Service, and be approved for the finished product. The solicitation called for bids to be submitted on four items and informed bidders that the government required a minimum acceptance period of 30 calendar days.

030925 / 125948

Bids from Oregon, Ontario, and RAFCO were opened on July 10, 1984. The agency determined that Oregon was the low bidder on one item and Ontario was the low bidder on three items. Since Ontario had not previously produced cottage cheese for DPSC, on July 23, the agency requested a preaward survey of the firm. Award had been scheduled to be made by August 9, but on August 6, DPSC contacted the three bidders and requested that they extend their bid acceptance period to August 14. Oregon and Ontario complied with the request, but RAFCO refused to do so and accordingly it was removed from consideration for award. Both Oregon and Ontario continued to extend their bids in response to subsequent agency requests.

On August 10, the Defense Contract Administration Services Management Area (DCASMA) branch office located in Buffalo, New York, recommended award to Ontario on the basis that although at that time Ontario's plant did not have USDA approval, the firm would be able to obtain approval if it took some corrective action deemed to be within its capability. USDA, in fact, approved Ontario's plant on September 5. However, award of a contract to Ontario for the three items for which it was the low bidder has been withheld pending a decision on this protest. On the other hand, DPSC determined on July 27 that Oregon's plant was approved by USDA, and it awarded Oregon a contract on August 22.

RAFCO contends that the only permissible reason for an extension of the award date after bid opening is "administrative difficulties," Federal Acquisition Regulation, § 14.404-1(d), 48 Fed. Reg. 42,102, 42,179 (1983) (to be codified at 48 C.F.R. § 14.404-1(d)), but there were no such difficulties present here. It asserts that the extension of the award date was granted for the improper purpose of allowing the plants of Oregon and Ontario to obtain USDA approval for processing cottage cheese. RAFCO further contends that rather than delaying award, the agency should have rejected the bids of the other two firms as nonresponsive and awarded it the contract since it was the only bidder with USDA approval of its plant as of the date of bid opening.

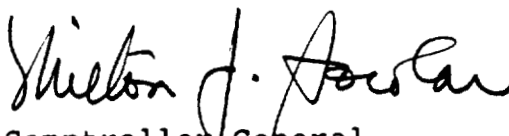
Initially, we point out that the question of whether either bidder complied with the solicitation's requirement of USDA approval of its plant relates to a bidder's responsibility since it concerns the bidder's performance capability, rather than bid responsiveness which concerns a bidder's promise to perform. U.S. Jet Aviation, B-214093, May 25, 1984, 84-1 C.P.D. ¶ 575. Our Office has held therefore that an agency may allow a prospective awardee a reasonable period of time after bid opening within which to cure a problem related to its responsibility, including the need to obtain any necessary certification, since contract award and not bid opening is the critical time for determining the responsibility of a firm. Ameriko Maintenance Co., B-208485, Aug. 27, 1982, 82-2 C.P.D. ¶ 184. Accordingly, DPSC had the discretion to allow Oregon and Ontario a reasonable amount of time to obtain the USDA approval of their plants necessary to perform these contracts. Furthermore, we have recognized that procuring agencies have substantial discretion under the regulations to request--but not require--bid acceptance period extensions where the agency experiences administrative delays. See Yardney Electric Division, B-201846, June 2, 1981, 81-1 C.P.D. ¶ 440. In our view, a bid extension request to permit additional time to determine a firm's responsibility is within the agency's discretion. Yardney Electric Division, supra.

Here, the procuring activity delayed award for an 8 week period between bid opening and proposed award to Ontario and a 6 week period between bid opening and award to Oregon. The protester has not established that these were unreasonable periods of time for obtaining the necessary USDA approval. See Career Consultants, Inc., B-200506.2, May 27, 1981, 81-1 C.P.D. ¶ 414. Accordingly, we deny the protest.

RAFCO also requests that it be awarded reasonable compensation and damages for losses incurred as a result of DLA's actions in this procurement. However, there is no legal basis for allowing an unsuccessful bidder to recover lost income or anticipated profits, even if the bidder

B-216199

should have received the award. See Power Systems--Claim
for Costs, B-210032.2, Mar. 26, 1984, 84-1 C.P.D. ¶ 344.

for 
Comptroller General
of the United States