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

FILE: B-219424 **DATE:** July 24, 1985

MATTER OF: Olympic Container Corporation

DIGEST:

1. An allegation that the agency did not comply with the Federal Acquisition Regulation factors that an agency must consider before making a determination to lease or purchase is not timely because the protest was not filed within 10 days of the time the protester knew or should have known of the basis for protest.

2. To be timely, a protest challenging the propriety of a specification that does not require shipping containers to have a full plywood lining, must be filed prior to the closing date for the receipt of initial proposals.

3. Protest contending that the agency erred in not considering the cost of returning leased containers when evaluating the costs of purchasing other containers is without merit since the RFP did not include transition costs as an evaluation factor and an agency must adhere to the evaluation criteria listed in the solicitation or inform all offerors of any changes made in the evaluation scheme.

4. Protester's contention that the awardee cannot comply with the specifications at its proposal price raises an issue with respect to the affirmative determination of the awardee's responsibility that GAO will not review when the circumstances permitting exceptions to this rule are not applicable.

Olympic Container Corporation protests the award by the Department of the Navy of a contract for refurbished freight containers to Flexi-Van Leasing Corporation under request for proposals (RFP) No. N00033-85-R-0137. Among

other things, Olympic, which has been leasing containers to the Navy for several years, contends that the procurement was conducted without proper authority and in contravention of the provisions of the Federal Acquisition Regulation (FAR), that the lack of a requirement for a full plywood lining will result in the use of "dangerous conveyors of hazardous materials," that it is impossible for the awardee to comply with the specifications at its proposal price and that leasing would have been less expensive than purchasing the containers. The proposals were received on May 17, 1985 and Olympic's protest was received in our Office on June 28.

We dismiss the protest.

Olympic contends that the Navy lacked authority to purchase the containers because it did not comply with the FAR, 48 C.F.R. § 7.401 (1984), which provides guidance to the agencies pertaining to the decision to acquire equipment by lease or purchase, and lists certain factors that an agency should consider in making its decision. Olympic's assertion, however, is supported by nothing other than its statement that "it appears that the true costs of leasing v. purchasing were never analyzed in any suitable fashion." We think this basis of protest is untimely.

On March 14, 1985, Olympic sent a message to the Navy, wherein it raised the issue of the factors to be considered before a decision to lease or buy was made. It also suggested that it was prepared to "seriously negotiate" a rental for the containers already under lease along the lines of $1.52 per container per day, or $556 per container per year. Olympic had previously refused to extend the expired purchase option of $635 per container or to lower the rental from $4.48 per container per day.

On April 10, the solicitation to purchase refurbished containers was issued; no mention of a lease for them was contained in it. On April 16, the Navy advised a member of Congress who had inquired on Olympic's behalf, that the provisions of the FAR, subpart 7.4 had been fully considered. The Navy's letter did not use the tentative offer of $1.52 per day for cost comparison purposes; rather, it used the then current $4.48 per day lease cost as the basis for its decision.

Consequently it is clear that by the latter part of April Olympic knew that the Navy was not considering its offer to extend the lease or the factors that Olympic asserted should be considered, and that the Navy's basis

for proceeding with a purchase was premised on the lease price of $4.48 per day vice the tentative offer of $1.52 per day. Our bid protest procedures, 4 C.F.R. § 21.2(a)(2) (1985), require that protests be filed within 10 days after the basis of the protest is known or should have been known. Olympic nonetheless did not protest, but proceeded to participate in the procurement by offering to sell the containers already in the Navy's possession for $3212 ($2600 more than the original purchase option). It did not protest until after it discovered it lost the competition. The protest on this issue therefore is untimely and we will not consider it.

Similarly, Olympic's further contention that the Navy's solicitation did not require the containers to be supplied to have plywood linings as did those leased from Olympic is also untimely. The specification contained in the RFP required a wooden floor only; they did not require that they be otherwise lined with plywood. Therefore, to be timely, Olympic's protest should have been filed before the closing date for receipt of the initial proposals as required by 4 C.F.R. § 21.2(a)(1).

Olympic contends that the Navy's costs, including transportation, repairs and penalties, of returning the leased containers to Olympic will be so substantial that they would offset many times any advantage the Navy might obtain by accepting the awardee's lower price. The RFP, however, did not list these costs as an evaluation factor and it is well-settled that once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria or inform all offerors of any change made in the evaluation scheme. Umpqua Research Co., B-199014, Apr. 3, 1981, 81-1 CPD ¶ 254. Therefore, the Navy properly did not take these costs into account in determining the low cost offeror. Moreover, as it was obvious that the solicitation did not contemplate the inclusion of transition costs in the evaluations of costs, if Olympic believed they should have been included it should have protested prior to the closing date for receipt of proposals as required by 4 C.F.R. § 21.2(a)(1).

Olympic's challenge to the ability of the awardee to comply with all requirements of the solicitation at its proposal price is a challenge to the responsibility of the awardee. The fact that the award was made necessarily indicates that the contracting officer made an affirmative

determination of Flexi-Van's responsibility. Marathon Enterprises, Inc., B-213646, Dec. 14, 1983, 83-2 CPD ¶ 690. Such determinations will not be reviewed by our Office in the absence of a showing of possible fraud or in bad faith on the part of government officials or that definitive responsibility criteria in the solicitation may not have been applied. Seaton Van Lines, Inc., B-217298, Jan. 8, 1985, 85-1 CPD ¶ 26. None of these exceptions is applicable here. We therefore will not consider this issue.

Olympic also complains in detail about the troubles it had with the Navy under its lease contract over several years and the Navy's failure to accept Olympic's proposal for an extension of the lease at reduced rate rather than solicit proposals for the purchase of containers. These are matters of contract administration within the discretion of the contracting agency and are not for review by our Office since under our bid protest function we do not consider how contracting officers administer contracts that have been awarded. See 4 C.F.R. § 21.3(f)(1); Empire Electric Co., Inc., B-213621.2, Jan. 12, 1984, 84-1 CPD ¶ 68.

Finally, Olympic has requested a conference to discuss the merits of its protest. Where, as here, the merits of the protest are not for consideration, we see no useful purpose to be served by holding such a conference. See Logus Manufacturing Corp., B-216775, Jan. 8, 1985, 85-1 CPD ¶ 25.

The protest is dismissed.

Ronald Berger

Ronald Berger
Deputy Associate
General Counsel