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DECISION



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

FILE: B-220058

DATE: December 23, 1985

MATTER OF: Kavouras, Inc.

DIGEST:

1. The protester has the responsibility to present sufficient evidence to prove its case. Where an agency denies a protester's contention that the agency engaged in an improper price auction by obtaining a price from the protester and using the protester's price to secure a lower price from another contractor, and the protester fails to furnish probative evidence to the contrary, the contention is speculative and the protester has not met its burden of proof.
2. A Federal Supply Schedule contractor may institute a general price reduction in its schedule contract during the contract period, provided the reduction is applied to all federal agencies for the duration of the contract.
3. Purchase from a Federal Supply Schedule does not require common cutoff date for receipt of best and final offers.
4. Protest that the agency improperly included an installation fee in the evaluation of the protester's price quotation, even though the protester's Federal Supply Schedule contract contained no such fee, and that the agency failed to include an installation fee in the evaluation of the awardee's price quotation, even though such a fee is contained in the awardee's Federal Supply Schedule contract, is denied where the record shows that the protester expressly included an installation fee in its price quotation and the awardee omitted the installation fee in its price quotation.

Kavouras, Inc., protests the issuance of delivery order No. DTFA07-85-D-01740 by the Federal Aviation Administration (FAA) to Alden Electronics (Alden) in the amount of

034124

\$131,193.66 for the procurement of remote weather radar display equipment from the General Services Administration's (GSA) Federal Supply Schedule (FSS). Kavouras complains that in accepting Alden's lower-than-FSS price after meeting with Kavouras, the FAA engaged in auction techniques. Kavouras also contends that the FAA improperly evaluated the prices and contracts of Kavouras and Alden.^{1/} We deny the protest.

On July 23, 1985, the FAA received an unsolicited proposal from Kavouras, which has an FSS contract for the equipment. On August 29, Kavouras representatives met with FAA personnel to submit a modification to Kavouras' FSS contract. The contracting officer informed Kavouras representatives that the firm's price was the lowest offered to the government--relative, apparently, to Alden's schedule price for the equipment--and that Kavouras therefore probably would be awarded the contract.

On August 30, FAA personnel met with Alden representatives and received a proposal containing a price lower than Kavouras' price and lower than Alden's FSS contract price. Based on Alden's lower price and what the FAA determined was an urgent need for weather radar at flight service stations, the order was issued to Alden on September 4.

Kavouras protests that by accepting a lower price quote from Alden after meeting with Kavouras, the FAA engaged in auction techniques and a de facto "one-sided negotiated procurement" that should have included a common cutoff date for the receipt of best and final offers. In support of this position, Kavouras points to Alden's "fortuitous" submission of a low price 1 day after Kavouras met with FAA personnel and suspects that FAA personnel informed Alden of the agency's probable purchase of equipment from Kavouras, thus providing Alden with the opportunity to undercut Kavouras' price. Kavouras complains that had the FAA informed Kavouras of Alden's price reduction, Kavouras could have submitted a price reduction of its own.

The FAA reports that discussions with Alden and Kavouras concerned the technical aspects of their equipment

^{1/}Kavouras has another protest in connection with this procurement pending before our Office concerning Alden's maximum order limitation, which Kavouras raised in its comments to the FAA's report in this protest. A decision on this issue is forthcoming.

and were not for the purposes of price negotiation. Alden's price reduction, the FAA states, was unsolicited, and its acceptance by FAA personnel was not improper. Further, the FAA responds that it was under no obligation to notify Kavouras that Alden had revised its prices or to set a common cutoff date for the receipt of best and final offers, as it was not conducting a negotiated procurement.

With regard to Kavouras' contention that the FAA engaged in a price auction by first obtaining a price from Kavouras and then using that price to negotiate a lower price from Alden, we have held that a protester has the responsibility to present sufficient evidence to prove its case. Where an agency denies the protester's contention and the protester fails to furnish the required evidence, the contention must be regarded as speculative only, and the protester has not met its burden of proof. See The Trade Group, B-212544, Oct. 24, 1983, 83-2 C.P.D. ¶ 484.

The record is not clear as to what prompted Kavouras or Alden to submit what the FAA states were unsolicited proposals. A contractor may institute a general price reduction in its FSS contract during the contract period, provided an equivalent price reduction is applied to sales to all federal agencies for the duration of the contract. Lanier Business Products, Inc., B-211641, Oct. 25, 1983, 83-2 C.P.D. ¶ 493. We have no basis on which to conclude that Alden's reason for reducing its price was any less legitimate, or more suspicious, than was Kavouras'. Kavouras fails to offer any probative evidence that the FAA used Kavouras' quotation to solicit a lower price from Alden, aside from the fact that Alden reduced its price after Kavouras met with FAA personnel. This circumstance alone, however, is not enough to prove Kavouras' contention that the FAA conducted an improper auction between the two firms. Thus, we deny this portion of Kavouras' protest.

Furthermore, we disagree with Kavouras' characterization of this purchase as a negotiated procurement requiring a common cutoff date for the receipt of best and final offers. This procurement was an attempt to secure supplies from the FSS. When an agency uses the simplified purchasing procedures under the FSS, it is entitled to issue delivery orders directly to schedule contractors for the supplies it desires. Under these circumstances, an agency, like the FAA, is not required to set a common cutoff date for the receipt of best and final offers. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 8.401 (1984). Moreover, we

note that Kavouras was not prejudiced by the FAA's action, as Kavouras had an opportunity to submit its price. Had the FAA attempted to secure a lower price from Kavouras based on Alden's reduced price (which appears to be what Kavouras desires), the FAA would have engaged in the same type of auction of which Kavouras complains.

Kavouras next protests that in evaluating its price, the FAA included an \$800 per site installation charge for Kavouras' equipment, though such a charge does not appear in Kavouras' FSS contract. Further, Kavouras contends that the FAA failed to include site installation charges for Alden's equipment in its evaluation of Alden's price, even though such charges are contained in Alden's FSS contract. This FAA action, Kavouras complains, misrepresented Kavouras' price as more than Alden's price. Kavouras argues that the FAA should have compared the prices of each contractor's equipment without consideration of site installation charges.

The FAA reports that Alden does not charge an installation fee for its equipment. The FAA states that although Kavouras' per unit price initially appears lower than Alden's per unit price (\$9,012.80²/ as compared to \$10,091.82), Kavouras' overall cost to the FAA would be more than Alden's because Kavouras charges a greater monthly maintenance/access fee than does Alden and because Kavouras charges a site installation fee. When accounting for Kavouras' fees, Kavouras' equipment costs \$10,396.48 per unit as compared to Alden's cost of \$10,091.82.

We find no merit in Kavouras' argument. As we stated above, contractors have the opportunity to lower their FSS prices during the contract period. The record shows, and the FAA informally advises us, that Alden lowered its price by eliminating its installation fee. Conversely, we find in Kavouras' submission to our Office, and in the FAA report, two separate price quotes from Kavouras that include an installation charge of \$800 per site. In short, it appears that Alden took advantage of an FSS contractor's general opportunity to lower its price and, as a consequence,

²/This figure accounts for Kavouras' 14-percent aggregate discount, which the FAA failed to include when comparing costs initially. As shown above and in the FAA's report, this was of no prejudice to Kavouras, as Kavouras' overall cost, with the discount, is higher than Alden's.

Alden's cost to the FAA was lower than Kavouras' unsolicited offer. Under these circumstances, we find no basis for Kavouras to complain, and we deny this portion of Kavouras' protest.

Additionally, we note that this contract involves equipment under the FSS contract group 58, part VI, nonmandatory telecommunications schedule. Orders placed against a GSA nonmandatory telecommunications schedule contract (including a multiple-award schedule) are subject to the requirements of section 201-40.008 of the Federal Information Resources Management Regulation, 41 C.F.R. § 201-40.008 (1985). This regulation, promulgated by GSA, provides that a contracting agency may not place an order in excess of \$50,000 against a nonmandatory telecommunications schedule contract without first considering the availability of other sources by publishing a synopsis in the Commerce Business Daily at least 15 days before placing the order. The synopsis announces the intent to place an order and, based on the responses of nonschedule vendors, the agency determines whether placing the order would be the least costly alternative. If an evaluation of the responses indicates that placing the order would not be the least costly alternative, the contracting agency should issue a formal solicitation and invite all vendors, including schedule vendors, to compete. See Kavouras, Inc., B-219508, Nov. 12, 1985, 85-2 C.P.D. ¶ ____.

The FAA, by placing an order directly against the schedule, failed to comply with the requirements of section 201-40.008. Kavouras, however, had an opportunity to submit a price quote and had that quote evaluated, so that Kavouras was not prejudiced. Further, Kavouras is not an intended beneficiary under the regulation, as this regulation's intent clearly is to open competition to nonschedule vendors where cost effective to the government. Nevertheless, and notwithstanding that we cannot find that an auction took place here, we point out that had the FAA met its responsibilities under this regulation the appearance of impropriety that the purchase from Alden raised certainly would have been avoided.

The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel