



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: R. T. Nelson Painting Services, Inc.

File: B-227953

Date: October 16, 1987

DIGEST

Contentions that amendment of solicitation after submission of best and final offers (BAFOs) which consequently led to the reopening of the competition for a second round of BAFOs was unnecessary and unreasonable, and that the reopening of the competition created an improper auction, are untimely where asserted in protest filed after the closing date for receipt of the second round of BAFOs.

DECISION

R. T. Nelson Painting Service, Inc. protests the award of a firm, fixed-price, contract to Bay Decking Co. based on a second round of best and final offers (BAFOs) under request for proposals (RFP) No. NOO406-87-R-0573, issued by the Naval Supply Center, Bremerton, Washington. We dismiss the protest.

The solicitation invited offers for all services and materials necessary for the replacement of non-skid deck coverings on certain naval vessels docked in Puget Sound. To facilitate performance of the contract during periods of inclement weather, the RFP, as amended, required offerors, among other things, to supply a suitable enclosure, e.g., a tent, that would ensure that the environmental conditions necessary for application of the coverings would be maintained. The RFP did not require a specific line item price for this enclosure. After the submission of BAFOs, and following conversations with the low offeror, Nelson, concerning its price, the contracting activity decided to amend the terms of the solicitation to make the requirement for the enclosure a separate line item and to provide that title to the item would pass to the government. Due to these changes, the amendment also requested offerors to submit a second BAFO. Bay Decking submitted the low offer in response to this second BAFO request, and subsequently was awarded the contract after the contracting officer found it to be a responsible offeror and its low price to be reasonable.

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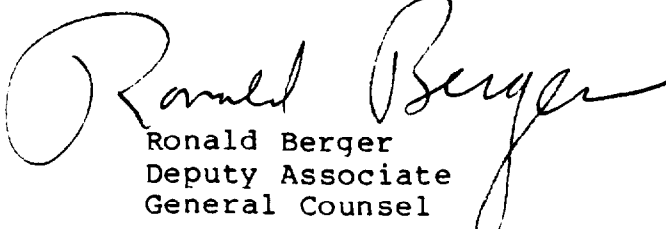
Nelson argues that it was unreasonable for the Navy to amend the solicitation after submission of BAFOs. Nelson maintains that this change was unnecessary as the solicitation already provided for the transfer of title of the enclosure or, alternatively, that the amendment was a de minimis change that would be better accomplished by the issuance of a change order to the awardee. Additionally, Nelson contends that the reopening of the competition created an improper auction that placed it at a competitive disadvantage. In this regard, Nelson believes that, prior to the reopening, its position as the low offeror under the initial BAFO was disclosed, as evidenced by the contracting activity's being notified, before the reopening, of Bay Decking's intent to challenge Nelson's status as a small business if Nelson were selected for award.

We find both of these allegations to be untimely. Our Bid Protest Regulations provide that protests based on alleged improprieties incorporated into a solicitation by amendment must be filed not later than the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1987); see Collins & Aikman--Request for Reconsideration, B-225439.4, Feb. 5, 1987, 87-1 CPD ¶ 126. Here, Nelson learned of the amendment resulting in the reopening of the competition, as well as Bay Decking's intention to file a protest challenging its status as a small business, 6 days before the due date for receipt of revised BAFOs, yet did not protest the agency's decision to reopen the competition until 7 days after the second BAFO closing date. In fact, Nelson first raised its concerns regarding the propriety of the amendment in its comments to the agency's administrative report in response to this protest, which were not received in our Office until approximately 6 weeks after the closing date. The protest therefore is untimely.

In any case, the contracting activity's issuance of the amendment modifying the terms of the solicitation appears to be unobjectionable on its face considering the magnitude of the change (as much as \$200,000) in the agency's requirements. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.606 (1986). Accordingly, it follows that the reopening of the competition cannot be viewed as an improper auction. See Youth Development Associates, B-216801, Feb. 1, 1985, 85-1 CPD ¶ 126. Prohibited auction techniques essentially consist of indicating one offeror's price to another during negotiations, thereby promoting direct price bidding between offerors. FAR, 48 C.F.R. § 15.610(d)(3); see CC Distributors, Inc., B-225446, Feb. 18, 1987, 87-1 CPD ¶ 183. This did not happen here. Rather the record reveals that Bay Decking only inadvertently learned of the pending award to Nelson from an unidentified nongovernmental source

who indicated that he was going to work for Nelson in Washington. Thus, there is no evidence of any improper agency action.

The protest is dismissed.



Ronald Berger
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