



Comptroller General
of the United States

Washington, D.C. 20548

MR. MORROW

Decision

Matter of: Western Roofing Service

File: B-232666.4

Date: March 5, 1991

Claire E. Duffy for the protester.
Robert C. Mackichan, Jr., Esq., Office of General Counsel,
General Services Administration, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protester's nonreceipt of an amendment requesting a new round of best and final offers provides no legal basis to challenge the validity of the award where the record does not indicate that agency deliberately attempted to exclude offeror from the competition or otherwise violated applicable regulations governing the distribution of amendments.
2. Award may not be made upon the basis of an offeror's unrevoked 13-month-old best and final offer (BAFO), even though the BAFO had no stated acceptance period, inasmuch as a reasonable time for accepting the offer had passed, the offeror did not respond to a new request for BAFOs, and the offer to accept award under the old BAFO was made after award under the latest BAFO to the offeror who submitted the lowest price on both BAFOs.

DECISION

Western Roofing Service protests the award of a contract to Bryant Organization, Inc. under request for proposals (RFP) No. GS-09P-88-KTC-0225, issued by the General Services Administration (GSA), for roofing repairs.

We deny the protest.

The solicitation initially was issued as a formally advertised procurement on July 15, 1988, to obtain roofing repairs for the Federal Supply Warehouse, South San Francisco, California. The contractor was required to remove, replace, and repair the existing roof, including the removal of asbestos-contaminated roof felts.

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At bid opening on August 26, 1988, GSA received five bids. GSA determined that only the high bidder, Bryant, was responsive. Because it was concerned with Bryant's high price, GSA converted the solicitation to a negotiated procurement on September 2 by amendment Nos. 0003 and 0004 and solicited proposals from the four remaining bidders.^{1/} Award under the RFP was to be made to the low priced technically acceptable offer.

On September 16, GSA received four proposals. Western protested that GSA had improperly included one of the offerors, American Felson Company, in the competition. Western withdrew the protest on being informed that it was in line for the award, since American Felson's proposal was determined unacceptable. On September 27, GSA made award to Western. American Felson then protested the award to Western on October 13. Our Office dismissed that protest as academic when GSA reopened discussions and requested best and final offers (BAFO) to be submitted by December 14.

On December 13, Western protested GSA's decision to reopen negotiations. This protest was denied on April 11, 1989.^{2/} On June 10, 1989, GSA terminated Western's contract. On August 16, 1989, by amendment No. 0008, GSA requested a third round of BAFOs. On August 23, GSA received BAFOs from Bryant, Western, and American Felson. Bryant submitted the low priced BAFO at \$1,816,000, while Western proposed \$1,855,485 and American Felson \$1,898,323. Before award was made, the October 17 San Francisco area earthquake occurred. Thus, GSA delayed the procurement until seismic and structural studies were conducted on the warehouse to ensure the soundness of the structure for roofing repair.

On August 12, 1990, GSA issued amendment No. 0009. This amendment incorporated a revised Davis-Bacon wage determination and updated clauses, and requested a fourth round of BAFOs. No changes to specifications were made. On August 21, the closing date, only Bryant submitted a BAFO. GSA made award to Bryant on October 5. On October 17, Western learned of the award and filed this protest in our Office on October 25.

Western protests that it was wrongfully excluded from the competition, inasmuch it did not receive Amendment 0009 requesting BAFOs. Western claims that since its

^{1/} One bidder was found unqualified and eliminated from the competition.

^{2/} Western Roofing Service, B-232666.3, Apr. 11, 1989, 89-1 CPD ¶ 368.

August 23, 1989, BAFO had not been revoked, GSA could not exclude it from the competition. GSA responds that it sent Western Amendment 0009, and that Western's proposal cannot be considered since Western did not acknowledge Amendment 0009, which GSA asserts is material.

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. North Santiam Paving Co., B-241062, Jan. 8, 1991, 91-1 CPD ¶ _____. In pursuit of these goals, it is a contracting agency's affirmative obligation to use reasonable methods, as required by the Federal Acquisition Regulations (FAR), for the dissemination of solicitation documents, including amendments and requests for BAFOs, to prospective competitors. Id.; FAR §§ 14.203-1; 14.205; 14.208; 15.403; 15.606(b); 15.611(a). Concurrent with the agency's obligations in this regard, prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents. Ktech Corp., B-240578, Dec. 3, 1990, 90-2 CPD ¶ 447; Fqrt Myer Constr. Corp., B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200.

As a general rule, the risk of nonreceipt of an amendment rests with the offeror. Data Express, B-234468, May 25, 1989, 89-1 CPD ¶ 507. Consequently, a prospective offeror's nonreceipt or late receipt of solicitation amendments, and consequent elimination as a source from the competition, will not justify overturning a contract award, absent a failure to comply with applicable regulations governing the distribution of amendments. North Santiam Paving Co., B-241062, supra.

Here, there is no evidence that the agency deliberately attempted to exclude the protester from the competition. Specifically, GSA advises that the amendment was sent to all offerors and has furnished us a copy of an amendment addressed to Western, the original of which GSA states it mailed.^{3/} Western does not allege that the amendment was not properly sent and has presented no evidence that any offeror other than itself failed to receive the amendment.

^{3/} Given the passage of a year since receipt of the August 1989 BAFOs, it would have been prudent for the contracting officer to have telephoned the three offerors remaining in the competition in August 1990 to solicit their continuing interest in this procurement. However, there is no law or regulation that requires this to be done.

While Western advises that it periodically contacted the procuring agency to determine the status of the procurement, Western has not indicated on what dates or with what frequency it did so. In view of the 2-month period from the issuance of Amendment 0009 in August 1990 to when Western became aware of the award in October 1990, it is apparent that Western's efforts to ascertain the status of this procurement and to obtain new amendments was less than diligent. See Ktech Corp., B-240578, supra.

Finally, Western brought its failure to receive the amendment 0009 to GSA's attention after award was made, so GSA could not readily remedy the situation. See Essex Electro Eng'r, Inc., B-234089.2, Mar. 6, 1990, 90-1 CPD ¶ 253. Under the circumstances, we ascertain no violation of law or regulation or unreasonable conduct on the part of GSA that resulted in Western's failure to receive the amendment, nor in the contracting officer's decision to accept the one proposal received.^{4/}

Western argues that notwithstanding its failure to receive the amendment to the RFP, GSA could have evaluated its last offer because neither the RFP nor its offer had a stated acceptance period and Western had not revoked the offer at the time of the award. GSA responds that Amendment 0009 is a material

^{4/} While only one proposal was received and Western asserts it would stand by its earlier BAFO price of \$1,855,485, there is no evidence that Bryant's \$1,981,008 price was unreasonable. Given the 13-month period since previous prices had been submitted, the contracting officer could have concluded that inflation and new market conditions accounted for the higher price. We note that the contracting officer could have contacted the other offerors when the agency received only one proposal at a higher price than earlier proposed to ascertain the reasons the other offerors did not submit offers. See Weeks Marine, Inc./Bean Dredging Corp., a Joint Venture, 69 Comp. Gen. 108 (1989), 89-2 CPD ¶ 505. However, the applicable regulations did not require him to do so, since he considered Western's price to be reasonable. Reinhold Industries, B-236892.2, Jan. 30, 1991, 91-1 CPD ¶ ____.

amendment, since it included revised Davis-Bacon Act wage rates and "updated" clauses, and Western's failure to acknowledge this amendment renders its proposal not susceptible to acceptance.^{5/}

From our review of the RFP, its amendments and the proposals, it appears that there is no express expiration date for Western's August 23, 1989, BAFO.^{6/} Where an offer does not specify the time within which it may be accepted, it must be accepted within a reasonable time.^{7/} 26 Comp. Gen. 365, 367 (1946); National Movers Co. v. United States, 386 F.2d 999 (Ct. Cl. 1967). Similarly, CICA requires an agency to make award, after receipt of proposals, "with reasonable promptness". 41 U.S.C. § 253b(d)(4). A reasonable time to make award, after an offer that contains no expiration date is received, is determined by consideration of all the circumstances in the case. Id.; B-126073, Dec. 15, 1955.

Under the circumstances here, we think that Western's August 23, 1989, offer could no longer be accepted by the agency. Over 13 months had passed between Western's submission of its proposal for this construction contract and the award. There has been general inflation during this period and economic conditions of the construction industry in the San Francisco area could have significantly changed since the 1989 earthquake. Thus, while it is true that Western never advised GSA that it would not be bound by acceptance of its August 1989 offer over a year later, see 26 Comp. Gen. supra, the firm did not renew its August 1989 price until after award to Bryant. Given Western's failure to respond to the BAFO request, it was not unreasonable for GSA to conclude

^{5/} Western disputes whether Amendment 0009 is a material amendment, since it has a collective bargaining agreement that obligates it to pay at least the Davis-Bacon Act wages and the revised wage determination allegedly has a de minimus effect on its proposal price. See ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436. Moreover, GSA has not specified how the contract clauses were updated. However, we need not decide whether this was a material amendment in view of our conclusion below that Western's offer had expired.

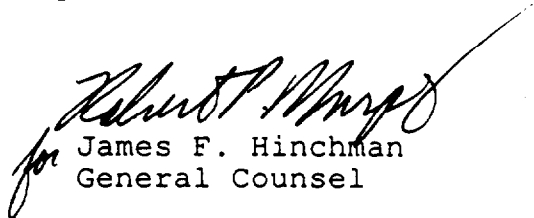
^{6/} Ordinarily, proposals have expiration dates. The RFP omitted the required standard Form 1442, which would have stated an offer acceptance period. See FAR § 36.701(b).

^{7/} Section 2-205 of the Uniform Commercial Code, which we look to as one source of federal common law, R.H. Pines Corporation, 54 Comp. Gen. 527, 528 (1974), 74-2 CPD ¶ 385, provides that, if no time is stated, an offer will remain open for a reasonable time.

that Western was no longer interested in the procurement and to proceed with an award to Bryant, which submitted a timely response to Amendment 0009.

Western argues that even assuming its August 1989 proposal had expired, its proposal can be revived. There are a number of circumstances in which an expired bid or proposal may be revived where the integrity of competitive system will not be compromised. For example, a low bidder, which offered the bid acceptance period required by an invitation for bids, may revive its expired bid. See Rubbermaid, Inc., B-238631, May 2, 1990, 90-1 CPD ¶ 444. Also, where all proposals have expired, an agency may allow the successful offeror to waive the expiration of its proposal acceptance period and make award on the basis of the proposal as submitted, since a waiver under such circumstances is not prejudicial to the competitive system. See Sublette Elec., Inc., B-232586, Nov. 30, 1988, 88-2 CPD ¶ 540. These situations are not applicable here, however, since Bryant, not Western, submitted the low BAFO price both in August 1989 and in August 1990. Bryant and the competitive system would be prejudiced by allowing Western's August 1989 offer to be revived.

The protest is denied.


for James F. Hinchman
General Counsel