



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: G.D. Searle & Company

File: B-247077

Date: April 30, 1992

L. Stephen Quatannens, Esq., Gardner, Carton & Douglas, for the protester.
Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Scott H. Riback, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation permits the submission of offers by telefacsimile machine only "if authorized" and does not elsewhere provide authorization, agency properly rejected facsimile offer submitted based upon alleged oral authorization of contract specialist; authorization for submission of facsimile proposals concerns the submission of proposals and therefore must be furnished by amendment to all offerors.

DECISION

G.D. Searle protests the rejection of its offer under request for proposals (RFP) No. DLA120-91-R-0148, issued by the Defense Logistics Agency (DLA) for verapamil hydrochloride tablets. DLA rejected the proposal because it was submitted to the agency by facsimile transmission.

We deny the protest.

The RFP called for the submission of firm, fixed unit prices for varying estimated quantities of verapamil hydrochloride tablets and contemplated the award of a requirements contract for a base year with two 1-year options, on the basis of the lowest aggregate cost to the government. Offerors were required to submit initial proposals by February 11, 1991.

The solicitation contained Defense Personnel Supply Center (DPSC) Standard Form (SF) 33; Solicitation and Offer, which, in block 7a, instructed offerors to "address electronic transmissions (when authorized) to: Facsimile: 215 737-2228." The DPSC SF 33, in block 8 also provided, as

follows: "To assure prompt delivery . . . electronic transmissions [should be sent] per block 7a. . . ." The solicitation was otherwise silent as to whether facsimile proposals were acceptable. Specifically, it did not contain the standard clause relating to the submission of proposals by facsimile transmission, Federal Acquisition Regulation (FAR) § 52.215-18, Facsimile Proposals, which permits the submission of facsimile proposals. Although the RFP incorporated by reference FAR § 52.215-9, Submission of Offers, it referenced the April 1984 version of that clause rather than the current version. While the current version of the clause provides that "facsimile offers, modifications or withdrawals will not be considered unless authorized by the solicitation," FAR § 52.215-9(c), the April 1984 version of it contains no statement regarding the acceptability of facsimile offers.

Three offers, including Searle's, were received in response to the RFP. Searle's proposal was submitted by telefacsimile machine. DLA determined that all offers were technically acceptable and requested, by facsimile transmission, that best and final offers (BAFOs) be submitted.¹ When it did not receive a BAFO from Searle, DLA contacted the firm and was informed that Searle had not received the request for BAFOs. In view of Searle's failure to receive the BAFO request, DLA requested a second round of BAFOs. All three offerors submitted BAFOs, and Searle offered the low price. DLA determined, however, that it could not make award to Searle because it had telefaxed its initial proposal. DLA then made award to the next low offeror, Knoll Pharmaceutical. This protest followed.

Searle argues that DLA acted improperly in rejecting its proposal. The protester alleges that the language in blocks 7a and 8 of the DPSC SF 33 permitted facsimile offers, provided authorization from the contracting activity was obtained. Searle further alleges that it obtained oral authorization to submit its initial proposal by telefacsimile machine from the DLA contract specialist handling this procurement. In support of this argument, Searle points out that, unlike most cases involving improperly telefaxed offers, the solicitation here did not contain the language found at FAR § 52.215-9(c), and thus did not prohibit the submission of facsimile offers in the absence of express written authority in the solicitation. In the alternative, Searle argues that it essentially tendered a "new" offer both at the time it extended its initial, lapsed

¹Prior to this request for BAFOs, the agency requested that all three firms extend their offers, apparently because the acceptance period for the offers had lapsed. All three offerors furnished the requested extension.

offer and at the time it submitted its BAFO. According to Searle, since these "new" offers were properly transmitted to the agency, any defect in the submission of its initial offer was thereby cured.

DLA maintains that it properly rejected the Searle offer. DLA argues that because the solicitation did not contain a provision authorizing the submission of facsimile offers, the protester was on notice that it could not telefax its proposal. The agency argues that this case is analogous to our decisions relating to telegraphic submissions, e.g., Marbex, Inc., B-221995, Feb. 28, 1986, 86-1 CPD ¶ 212, which, according to DLA, stand for the proposition that telegraphic bids or proposals may not be accepted by the contracting agency unless explicitly authorized by the terms of the solicitation. DLA also maintains that even if its contract specialist did provide Searle oral authorization to submit its offer by telefax, that authorization was not binding and Searle therefore relied on it at its own risk.

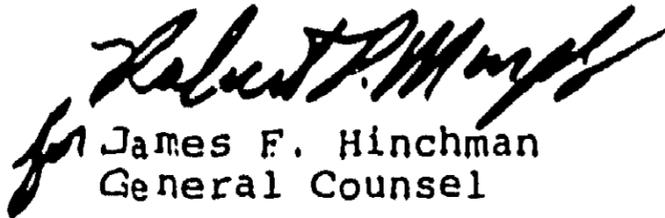
As a general rule, telegraphic bids may not be considered unless they are explicitly authorized by the solicitation. See, e.g., Marbex, Inc., supra. A facsimile bid modification is properly rejected where the solicitation does not authorize the submission by telefacsimile machine. H. Bendzulla Contracting, B-246112, Nov. 8, 1991, 91-2 CPD ¶ 441; Mabuhay Bldg. Maintenance Co., Inc., B-241908, Nov. 23, 1990, 90-2 CPD ¶ 424; see also Recreation Corp., B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249 (acknowledgment of amendment by telefacsimile machine ineffective where not authorized in the solicitation). The underlying basis for these holdings is our view that agencies are required to provide all offerors the same information in order to ensure that the acquisition is conducted on an equal basis for all competing firms. In this regard, the FAR provides that any information which is necessary in submitting proposals, or the lack of which would be prejudicial to a prospective offeror, should be provided to all prospective offerors, and not merely to one offeror, as a solicitation amendment. FAR § 15.410(c).

While Searle is correct that this solicitation did not contain the language in the current version of FAR § 52.215-9(c), expressly prohibiting facsimile offers "unless authorized by the solicitation," we nevertheless conclude that any authorization to submit an offer by telefax had to be in writing and furnished to all offerors. As noted above, block 7a of the DPSC SF 33 permitted the submission of facsimile offers only "if authorized." Authorization for the submission of facsimile offers was information which was necessary in submitting offers or quotations, and which, if furnished to only one offeror, could have conferred a potential competitive advantage--that is, more time in which

to prepare its proposal, FAR § 15.410(c). In the absence of written notice to all offerors, it would have been unfair and improper to consider Searle's proposal, since the other offerors were not provided the same information and opportunity regarding the submission of their offers.

We are also not persuaded by Searle's argument that extending the period for acceptance of its offer and submitting its BAFO cured its failure to submit a timely initial offer. The solicitation contained Defense Personnel Supply Center (DPSC) clause 52.214-0001, Timeliness and Place of Receipt of Offers/Modifications/Withdrawals, which permits the acceptance of a late offer only in limited circumstances. Even if we were to conclude, as Searle suggests, that these subsequent submissions constituted "new" offers, they nevertheless were submitted well after the closing date for receipt of offers and their submission does not fall under one of the limited exceptions in DPSC clause 52.214-0001 for permitting consideration of late proposals.

The protest is denied.


for James F. Hinchman
General Counsel