

Matter of: Datum Timing, Division of Datum Inc.

File: B-254493

Date: December 17, 1993

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Franklin R. Bay, Esq., Fulbright & Jaworski, for TrueTime, Inc., an interested party.
Ronald E. Cone, Department of Energy, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bonneville Power Administration properly made award based on discounted price offered by the awardee which was conditioned on early exercise of option without giving protester an opportunity to revise its proposal where solicitation specifically advised offerors to propose the best delivery terms they could and the procurement was conducted using simplified procedures authorized by the Bonneville Acquisition Guide which contemplate award without discussions.
2. Where protester submits a response to the agency report and fails to address certain issues raised in the initial protest and responded to in the report, General Accounting Office considers such issues abandoned.

DECISION

Datum Timing, a Division of Datum Inc., protests the award of a contract to TrueTime, Inc. under request for quotations (RFQ) No. 61734, issued by the Bonneville Power Administration. The protester objects to the agency's decision not to discuss price and technical terms with it.

We deny the protest.

On May 21, 1993, the agency issued the RFQ for a central timing system,¹ in accordance with technical specifications attached to the RFQ, including parts and materials, technical data, spare parts, testing and installation, and training; the solicitation also requested firms to quote on an optional system, spare parts, testing and installation.

The agency utilized its simplified procurement process, pursuant to Bonneville Acquisition Guide Interim Instruction Nos. 91-5 and 92-3;² these simplified procedures are similar to small purchase procedures and are used primarily for acquisition of off-the-shelf items with an anticipated dollar value between \$50,000 and \$500,000. The procedures generally do not involve the issuance of a written solicitation or advertisement by publication of a notice in the Commerce Business Daily. Under these procedures, procurements generally are conducted informally, by telephone, although a written RFQ may be issued, as in the instant case.

The procedures generally require receiving quotations from at least two sources, or more if the contracting officer believes that additional quotes are required to assure that the price and quality obtained are in the best interests of the government. RFQs are drafted in a simplified format; contracting officers obtain any necessary representations and certifications after award and may use any form of contracting normally permitted by the agency.

TrueTime submitted a quotation of \$404,874 for the basic and optional system, with spares; TrueTime offered a \$24,000 price reduction (for a total price of \$380,874) if the agency ordered the second system within 90 days. Datum's total price was \$395,000. Since the agency planned to

¹The timing system is installed at the agency's operations center, which controls the power transmission grid for the northwestern United States; the system helps to avoid power blackouts by synchronizing power demand. The agency is building a backup control center, where the optional system will be installed.

²While our Office has jurisdiction, pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551 et seq. (1988), over procurements by Bonneville, Bonneville has a special status as an agency specifically authorized to conduct commercial-type transactions under a broad statutory grant of authority; it is the Acquisition Guide, and not the Federal Acquisition Regulation (FAR), that governs Bonneville's actions. International Line Builders, 67 Comp. Gen. 8 (1987), 87-2 CPD ¶ 345, aff'd, B-227811.2, Nov. 10, 1987, 87-2 CPD ¶ 472.

exercise the option at an early date, it anticipated making award to TrueTime at its reduced price, which was lower than the protester's price. Before making award, the agency sought clarification of certain aspects of TrueTime's proposal, which the firm provided. The agency, concerned over the possibility of damage to the items during shipping, also asked whether TrueTime would accept award on an FOB destination basis; TrueTime was willing to assume responsibility for damages in the course of shipping, without an increase in price, so long as the agency paid the shipping costs, which totaled \$1,750. The agency then awarded a contract to TrueTime, for both the basic and optional systems, in the amount of \$382,624, and this protest followed.

The protester contends that it was improper to make award to TrueTime based on its discounted price without giving the protester an opportunity to revise its proposal. To the extent that Datum suggests that TrueTime's price was lowered after discussions with Bonneville, Datum is incorrect. The awardee initially offered two prices, the lower one conditioned on Bonneville's exercise of the option within 90 days. In view of Bonneville's determination that it would exercise the option at the time of award, it properly considered the awardee's discounted price, which was lower than protester's. The RFQ specifically advised the offerors to offer the best delivery terms they could, in essence inviting offerors to structure their price proposals in the most favorable light possible.³ TrueTime took advantage of this opportunity while the protester did not; under these circumstances, we see nothing improper about considering Truetime's discounted terms.

The protester argues that if the agency did not intend to discuss price and technical terms with Datum, the solicitation should have contained a notification to that effect. The omission of standard clauses and notices is consistent with the procedures used here, where the solicitation consists of little more than a set of specifications and a price schedule. Indeed, as both the agency and the protester state, the simplified procedures generally involve oral requests rather than written ones; clearly they do not contemplate routinely advising offerors of the possibility that the agency might make award without discussions.

The agency also points out that the RFQ was issued after a lengthy process of defining the agency's technical

³The RFQ stated: "You may wish to submit one best delivery and one best price quote, as delivery may be a factor in [the] award decision."

requirements in consultation with industry; the agency discussed technical terms with Datum several months prior to requesting quotes and had incorporated many of Datum's recommendations into the specification. It therefore was contemplated, and should have been clear to the protester, that BPA might make award without discussions, and we find nothing improper in the agency's having done so, since its actions were consistent with the Acquisition Guide, which was the governing regulation.

In addition, even where Bonneville uses its standard procedures for competitive negotiated acquisitions, see Acquisition Guide subpart 15.6--as the protester appears to argue Bonneville should have done here--the Acquisition Guide contemplates that discussions normally will be held only with the top ranked offeror. Acquisition Guide § 15.609-70. Thus, even had the simplified purchase procedures not been used, Bonneville would not have held discussions with the protester.

The protester initially argued that it was inappropriate to use the simplified procurement process here because the Acquisition Guide allows using those procedures only for purchase of commercial items under \$250,000.⁴ The protester also contended that the agency had failed to give maximum consideration to small business participation in the procurement, as required by the Acquisition Guide.⁵ By letter of August 25, 3 weeks prior to submission of the agency report, the protester advised our Office that its "major concerns" were the awardee's representation of itself as a small business and the agency's alleged acceptance,

⁴As noted above, the Acquisition Guide in fact allows use of the simplified procedures for transactions up to \$500,000. The agency also states that commercial practice for the industry generally contemplates configuration of timing systems such as the one sought here to meet customers' needs; the contracting officer therefore determined that the acquisition was for a commercial item, appropriate for use of the simplified procedures.

⁵There was no provision in the RFQ either granting a preference for small businesses or restricting the competition to small businesses; to the extent that the protester argues that the RFQ should have contained such a preference, its allegation is untimely. See 4 C.F.R. § 21.2(a)(2) (1993). Further, the agency has advised our Office that based on its inquiries, the protester is the only small business capable of meeting requirements and that it was therefore inappropriate to set the procurement aside for small business. Contrary to the protester's contention, the awardee does not claim to be a small business.

after communicating with the awardee, of a quotation that was initially higher than its own.

Whether or not we view the protester's August 25 letter as a withdrawal of certain issues from consideration, the agency responded in full to each allegation initially raised and, except for the issue related to Bonneville's communications with TrueTime, the protester has offered no further support for them. In such an instance, where the protester submits a response to the agency report and fails to address issues to which the report responded, we consider such issues abandoned. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218. We would not in any event review the protester's challenge to the awardee's size status, since the Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives the Small Business Administration, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. 4 C.F.R. § 21.3(m)(2); Service Eng'g Co., B-235958, July 20, 1989, 89-2 CPD ¶ 71.

The protest is denied.

James F. Hinchman
General Counsel