DECISION

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

50957

FILE: B-183817 DATE: September 17, 1975

MATTER OF: J. K. Rishel Furniture Co. 97509

DIGEST:

1. Protest based on improper cancellation of IFB filed nearly 2 months after receipt of notice of rejection of all bids is untimely. Fact that agency did not limit negotiation after formal advertising to responsible bidders on IFB, which was allegedly made known to protester for first time upon receipt of agency's report on protest, is independent ground of protest and does not change fact that protest against determination to reject all bids is untimely.

2. Independent ground of protest--fact that procurement negotiated after formal advertising in accordance with FPR § 1-3.214 was not restricted to two responsible bidders on IFB is untimely since (1) protester in initial protest letter of May 12 stated belief that six firms had participated in negotiated procurement; (2) protester was aware by May 28 that award was made to firm other than one of two bidders on IFB; and (3) protest on this ground was not filed until July 1, or more than 10 working days after basis for protest was known or should have been known.

3. Protest filed after receipt of initial proposals against alleged improperly stated weight factors in RFP and unbalanced proposal received as direct result of that defect is untimely since protest based on alleged impropriety in solicitation must be filed prior to date set for receipt of proposals.

4. Where after receipt of initial offers, which resulted in receipt of fair and reasonable price, one offeror communicated to agency that it desired to revise offer. Since that offeror was not low on initial proposals its modification would have been late under FPR § 1-3.802-1. Moreover, agency's refusal to conduct negotiations was not improper because there was no fair indication that negotiations would prove highly advantageous to Government for Government had no evidence upon which to believe that negotiations might produce ultimate cost to it lower than lowest price initial proposal received.

On May 5, 1975, J. K. Rishel Furniture Co. (Rishel) filed a protest in our Office on the bases that:

1. the General Services Administration (GSA) acted improperly in rejecting all bids under invitation for bids (IFB) FPFO-S1-29639-A-1-23-75 which had sought bids on a quantity of office furniture;

2. GSA failed to request best and final offers with regard to the negotiated resolicitation (No. FEFP-S1-29639/2-N) for the furniture and also refused to accept Rishel's offer to modify its initial offer; and

3. the weight factors used in the negotiated procurement were incorrect.

Regarding Rishel's contention as to the improper cancellation, GSA's notification that the bids received were considered excessive, requiring that the IFB be canceled and the agency's requirements resolicited, was received by Rishel on March 6, 1975. In accordance with 4 C.F.R. § 20.2 (1974), Rishel's protest filed on May 5, 1975, is therefore untimely in this respect since it was not filed within 5 working days of the date upon which the basis for protest was known. Rishel argues, however, that its protest on this issue should be considered timely in that, upon receipt of the agency's report on the protest, it found out for the first time that GSA acted in violation of its own regulations, Federal Procurement Regulations (FPR) § 1-3.214 (1964 ed. Circ. 1), by not limiting any negotiated procedures held after receipt of unreasonable prices under formal advertising to the two responsible bidders which submitted bids in response to the IFB, Lycoming Furniture and itself.

The cancellation issue is, however, independent of the manner in which the agency negotiated, since per FPR § 1-2.404-1(b)(5) (1964 ed. amend. 121), the rejection of all bids is a prerequisite for the conduct of negotiations. In this regard, arguments relating to GSA's failure to restrict the negotiated procurement to Lycoming and Rishel present an issue separate and distinct from the cancellation of the IFB and, therefore, even if Rishel learned of GSA's failure to limit participants responding to the RFP only upon the receipt of the agency report, this does not change the fact that the initial ground of protest--the determination to reject all bids--is untimely.

Moreover, we feel that Rishel's arguments against GSA's alleged failure to restrict the negotiated procurement to those responsible

bidders which responded to the IFB are also untimely. As set out in its May 12 letter to our Office, Rishel "* * * believe[d] that at least six firms responded to the negotiated bid," and Rishel also was informed by telephone from this Office on May 20, 1975, that GSA intended to make an award and knew, at least by May 28, 1975, that said award had, in fact, been made to Drexel Enterprises. Therefore, since this independent ground of protest was not raised until July 1, 1975, or more than 10 working days after the basis for the protest was known or should have been known, the issue is not timely. 40 Fed. Reg. 17979 (April 24, 1975), at section 20.2(b)(2).

Similarly, Rishel's contention with regard to the alleged improperly stated weight factors and the resulting unbalanced proposal received as a direct result of that defect is also untimely since 4 C.F.R. § 20.2, supra, also states that:

> "* * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of proposals shall be filed prior to * * * the closing date for receipt of proposals. * * *"

Since in this instance the closing date for receipt of initial proposals was April 8, 1975, Rishel's protest on the basis of an apparent impropriety in the weight factors nearly 1 month thereafter is untimely. Moreover, its protest regarding the ultimate results of this impropriety is also untimely and will not be considered. See, generally, Society Brand, Incorporated, B-184400, August 7, 1975.

Rishel argues in the alternative that these matters present issues significant to procurement practices or procedures which would under section 20.2(c) of 40 Fed. Reg. 17979, supra, and 4 C.F.R. § 20.2(b) (1974) permit consideration of these issues. As stated in 52 Comp. Gen. 20 (1972):

> "* * * 'Issues significant to procurement practices or procedures' refers not to the sum of money involved, but to the presence of a principle of widespread interest. * * *"

Our review of the arguments presented does not indicate, however, that the issues of this case rise to that level.

With regard to Rishel's contention that GSA improperly failed to solicit best and final offers, we note that FPR § 1-3.805-1(a) (1964 ed. amend. 118) states in pertinent part that:

> "(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other factors considered, except that this requirement need not necessarily be applied to:
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> * * * * *
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> "(5) Procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price: Provided, That the request for proposals contains a notice to all offerors of the possibility that award may be made without discussion of proposals received and, hence, that proposals should be submitted initially on the most favorable terms, from a price and technical standpoint, which the offeror can submit to the Government. * * *"

In this context the solicitation stated in standard form 33A, paragraph 10(g), that:

> "The Government may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government."

Moreover, since GSA advises that the prices received for the low offeror, Drexel Enterprises, were 11.4 percent and 28.8 percent lower than current contract prices, we believe that it has clearly demonstrated that acceptance of Drexel's initial offer resulted in a fair and reasonable price. Accordingly, Rishel's subsequently stated desire to revise its proposal was not considered since it was viewed as a late modification and GSA also refused to conduct negotiations.

Clause 62(b) of GSA form 1424, Rev. 7-73, incorporated by reference into the RFP states that:

> "Any modification of a proposal, except a modification resulting from the Contracting Officer's request for 'best and final' offer, is subject to * * * [the following]
>
> "(a) Any proposal received at the office designated in the solicitation after the exact time for receipt will not be considered unless it is received before award is made, and
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> "(1) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers * * *
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> "(2) It was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or
>
> "(3) It is the only proposal received." FPR § 1-3.802-1 (1964 ed. amend. 118).

Under the above-noted clause any modification submitted by Rishel after the date set for receipt of proposals would clearly have been late since Rishel was not the lowest offeror based on initial proposals. This Office, however, has held that notwithstanding the fact that a proposal or modification received after the date set for receipt of initial proposals is late and not susceptible of acceptance, if it fairly indicates that negotiations would prove to be highly advantageous to the Government, the subsequent conduct of negotiations with all offerors within a competitive range is desirable to effectuate the spirit and intent of the negotiation provisions. 10 U.S.C. § 2304(g) (1970); FPR § 1-3.805-1(a) (1964 ed. amend. 118). See 47 Comp. Gen. 279, 284 (1967); B-167281, November 13, 1967. See, generally, 53 Comp. Gen. 5 (1973); B-171003, November 12, 1970; B-168085, December 29, 1969.

This rule (which is applicable per se only to late proposals and modifications received after that date set for receipt of initial proposals, see ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301; B-175280(1), October 5, 1972)) has alternately been stated as requiring that the proposed conduct of negotiations be in the best interests of the Government, B-166285(2), January 13, 1970; or indicate the possibility of substantial savings, B-176407, September 27, 1972, B-168085, supra; or merely put the Government in a position where it stands to benefit, B-176698, November 7, 1972. The cases almost without exception hold that unless a potentially significant dollar reduction below that of the low offeror is set out in the late proposal, negotiations need not be conducted. See B-168085, supra, where a potential $667 price reduction was deemed insufficient to fairly indicate that the conduct of negotiations after receipt of initial proposals would either prove to be highly advantageous or represent a substantial savings. Cf. B-167281, supra, where no negotiations were held even in the face of a $32,000 potential savings.

In the instant case, the only fact that Rishel communicated to the Government after receipt of initial proposals was that it desired to revise its offer. This fact alone is not sufficient, we feel, to fairly indicate that negotiations would prove highly advantageous to the Government for the Government had no evidence upon which to believe that negotiations might produce an ultimate cost to the Govenment lower than Drexel's initial prices. Consequently, GSA's refusal to conduct negotiations and seek best and final offers was not improper.

For the reasons stated above, Rishel's protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States