DECISION

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

60685

FILE: B-184832 DATE: March 30, 1976

MATTER OF: Universal American Enterprises, Inc. 98440

DIGEST:

1. ASPR small purchase procedures express preference for oral solicitation of quotations; do not prohibit use of written statement of work in making oral solicitation; and do not impose requirement for common cutoff date for best and final offers. Therefore, protest alleging that completely written solicitation was required--where Air Force base had urgent requirement to issue purchase order for security services--is denied. Protester's contention that its existing contract should have been extended is without merit, since contract extension procedure is just as noncompetitive as issuing purchase order to only firm submitting quotation.

2. Whether liquidated damages clause constitutes illegal penalty depends on conclusive showing that there was no possible relation between stipulated damages and contemplated losses. Protester's contention that damages could conceivably exceed contract price is immaterial and fails to show that damages are penalty. Moreover, since clause prescribes damages as definite percentage of contract price, ASPR § 1-310(a) requirement that amount of damages be stipulated in contract is not violated.

3. While deciding on precise type of security requirement to be included in contract is primarily function of contracting agency, procurement which required secret-cleared contractor personnel is arguably "classified" within meaning of ASPR § § 1-201.22 and 1-201.34. Also, ASPR § 3-608.2(b)(2)(i) provides that purchase order cannot be used outside United States unless procurement is unclassified. In view of urgent need for security services here, GAO recommendation for corrective action would be inappropriate. But Air Force base should avoid use of purchase orders for classified security services in future procurements.

4. While protester contends that contracting officer ignored proper procedures for handling protest, record shows that ASPR § 2-407.8(b)(3) requirement--calling for appropriate determination before proceeding with award in face of pending protest--was satisfied. Contracting officer was cognizant of before-award protest and sought legal advice before taking any action. Record adequately demonstrates that contracting officer determined to proceed with award on basis of urgent need for security services.

The protest of Universal American Enterprises, Inc. (UAE), concerns the issuance of a purchase order to Kentron Hawaii, Ltd. (Kentron), by the Base Procurement Office, Kunsan Air Force Base, Korea. The purchase order was for $9,305 worth of maintenance for intruder detection alarm systems during the period from September 1, 1975, to November 30, 1975. Though it realizes that no corrective action is possible, the contract having been completed, UAE has pursued its protest because it believes that the procurement was improper and illegal, and that our Office should render a decision to this effect.

At the outset, we note that many of the facts and circumstances are sharply controverted by the parties. Also, the parties disagree on various matters which we believe are essentially peripheral--for example, the Air Force has cited poor performance by UAE under the predecessor contract, while UAE contends that most of its performance problems were actually caused by the Government. In general, our objective in deciding protests is to determine if the award of a particular contract is subject to legal objection, not to conduct a policy review of the background and circumstances surrounding a given procurement. See Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232. We will be considering UAE's protest in this light.

UAE first contends that the contracting officer erred in not issuing a written solicitation. The contracting officer contacted prospective sources of supply and provided them with a written statement of work (SOW), but other terms and conditions were only discussed orally. UAE believes that under the Armed Services Procurement Regulation (ASPR), the solicitation could not be partly written and partly oral. The protester argues that if the contracting officer went to the trouble of preparing a written SOW, it would obviously have required only a minimum additional effort

to make the solicitation entirely written. UAE further points out that ASPR § 3-604.2(a) (1974 ed.) provides that a written solicitation should be used for purchase orders where, as here, the suppliers are outside the local area and special specifications are involved. The contracting officer's justification for the procurement method used is basically that the SOW specifications were not available until mid-August 1975; that the predecessor contract expired on August 31, 1975; and that the urgency of the situation therefore precluded use of a wholly written solicitation.

ASPR § 3-600, et seq. (1974 ed.), sets forth procedures for making small purchases. ASPR § 3-604.2 provides in pertinent part:

> "* * * Quotations should generally be solicited orally. Written solicitations should be used when (i) the suppliers are located outside the local area, (ii) special specifications are involved, (iii) a large number of line items are included in a single proposed procurement, or (iv) obtaining oral quotations is not considered economical or possible." (Emphasis added.)

Significantly, this provision does not use the imperative term "shall" (see ASPR § 1-201.16 (1974 ed.)), but the term "should," which we view as expressing preference or desire. Moreover, the regulation expresses the preference that, as a general proposition, quotations should be solicited orally. Lastly, we find nothing in the above provision or elsewhere in ASPR § 3-600, et seq., which precludes the use of a written SOW in the oral solicitation of quotations. In view of these considerations, we see no basis to conclude that the contracting officer's actions were improper.

Also, in connection with the oral solicitation of quotations, UAE contends that the contracting officer erred in not establishing a common cutoff date for receipt of best and final offers, as required by ASPR § 3-805.1(b) (1974 ed.). However, we note that the negotiation procedures prescribed in ASPR § 3-805, et seq, are inapplicable to procurement not in excess of $10,000. See ASPR § 3-805.1(a) as modified by Defense Procurement Circular No. 74-6, June 30, 1975.

UAE also contends that the issuance of a purchase order to Kentron was noncompetitive because of four sources contacted, only Kentron submitted a quotation. UAE believes that the contracting officer should have extended its contract, which it alleges would have resulted in a cost savings to the Government. UAE states that it was precluded from submitting a quotation on the purchase order,

since common sense dictates that it could not do so while protesting against the solicitation at the same time.

We must note, however, that it is not unusual for a protester to both protest against a solicitation and at the same time submit a bid or offer in order to protect its competitive position. Whether to do so is a judgment for the protester to make. Further, while it is alleged that the award to Kentron was noncompetitive, it must be noted that the extension of an incumbent's contract is an equally noncompetitive procedure. We see no merit in UAE's arguments on these points.

UAE next contends that the written SOW contained an improper penalty clause. The cited provision states that failure to render service within specified time limits would result in a deduction of 1/30 of the monthly rate for each additional 8-working-hour period that the system is inoperative. UAE contends that this is an illegal penalty provision because the damages could far exceed the contract price. Also, UAE believes that the provision violates ASPR § 1-310(b) (1974 ed.)--which provides that the contract shall set forth the amount of liquidated damages to be assessed against the contractor for each day of delay--since an amount is not specified in the contract here.

The Air Force states that the provision was necessary because the contractor's failure to perform would result in an extraordinary expense in assigning extra security forces to guard the facilities. The Air Force believes that the provision is a valid liquidated damages clause.

We note that ASPR § 1-310(a) provides that a liquidated damages provision may be used (1) if the time of performance is such an important factor that the Government may reasonably be expected to suffer damages if performance is delinquent, and (2) the extent of such damages would be difficult or impossible of ascertainment or proof. Also, we have held that whether a liquidated damages provision is an illegal penalty depends solely on the relation between the amount stipulated and the losses which were contemplated by the parties; for a penalty to be found, it must be conclusively shown that there was no possible relation between the damages and the contemplated losses. It is not material that actual losses are small as compared to the amount of damages agreed upon, or that damages exceed the contract price. See 46 Comp. Gen. 252, 258 (1966).

We see nothing in UAE's allegations which demonstrates that the provision was an illegal penalty. Also, since the amount of damages

is a definite percentage of the contract price, we see no basis to conclude that ASPR § 1-310(b) was violated.

UAE further contends that the issuance of a purchase order was improper because this was a classified procurement. The protester points out that under ASPR § 3-608.2(b)(2)(i) (1974 ed.), use of a purchase order in an amount not more than $10,000 outside the United States is authorized, provided the procurement is unclassified. UAE points out that both the predecessor and successor contracts to the purchase order required that offerors possess a Defense Industrial Security Clearance Office (DISCO) security clearance.

The Air Force takes the position that determining the appropriate security requirements is its procurement function and notes our Office's rule that we do not object to a contracting agency's determination of its requirements unless it is clearly shown to be without a reasonable basis. See, for example, Julie Research Laboratories, Inc., supra. The Air Force states that, here, a proper determination was made that the procurement need not be classified, and that only the contractor's employee assigned as maintenance technician had to possess a secret clearance and be a United States citizen.

The record shows that the contracting officer contacted the Chief of Security Police, Pacific Air Force, in Hawaii on August 18, 1975, and was advised that since the contractor personnel would have contact with classified drawings only in the presence of security-cleared Government personnel, all that was required was a secret clearance for the contractor's employee, and that a DISCO clearance was not necessary. In light of the scope of review of this Office of such matters as cited by the Air Force, supra, we see no basis to object to this determination.

However, as UAE has pointed out, ASPR §§ 1-201.22 and 1-201.34 (1974 ed.) define classified procurement and classified contract, respectively, as those which require access to classified information to perform the contract. Arguably, the present purchase order, involving access by a contractor employee to classified drawings, falls within this definition. Moreover, UAE has pointed out, ASPR § 3-608.2(b)(2)(i) apparently prohibits without exception the use of a purchase order in these circumstances. Therefore, we think that serious doubt is cast upon the propriety of using the purchase order technique to effect the present procurement.

However, we are mindful of the circumstances which were confronting the contracting officer. It appears that procurements for the Kunsan Air Force Base are not ordinarily conducted by the base itself, but by the United States 8th Army Procurement Center in Korea. The Air Force states that in the present case, it was impracticable to conduct a procurement through the Army because of the urgency. Therefore, the base contracting officer issued the purchase order in question to obtain services for 3 months--allowing time for the Army to issue a solicitation with appropriate security provisions covering a 1-year period. Under these circumstances, we believe that a recommendation by our Office for corrective action in connection with the purchase order, even if it were possible, would be inappropriate. However, we also believe that the base should make every effort in the future to conduct its classified procurements without resort to the purchase order method.

UAE also believes that the contracting officer ignored proper procedures for processing its before-award protest. UAE's protest was filed with our Office on August 27, 1975, and the purchase order was issued to Kentron on August 31, 1975. UAE alleges, among other things, that the contracting officer made statements over the telephone that a protest to GAO was out of order, and that the contracting officer sent it a letter purporting to deny the protest filed with GAO.

We find it unnecessary to discuss UAE's allegations and the Air Force's replies in detail. In our view, the only significant question is whether the procedure prescribed by ASPR § 2-407.8(b)(3) (1974 ed.) was properly followed. This provision states that where a written protest has been filed before the award, award shall not be made until the matter is resolved, unless the contracting officer determines that the items to be procured are urgently required; that performance will be unduly delayed by failure to make award promptly; or that a prompt award will otherwise be advantageous to the Government.

We believe this requirement was satisfied in the present case. The record shows that the contracting officer not only was cognizant of UAE's protest to our Office, but sought legal advice from the Pacific Air Force Procurement Center in Japan before proceeding with an award. We think the record adequately documents that the urgency of the procurement situation was, in the contracting officer's view, sufficient justification for a determination to proceed with award notwithstanding the protest. We see no basis for objection to the actions taken by the contracting officer in this regard.

The protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States