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DECISION



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

FILE: B-189570

DATE: February 1, 1978

MATTER OF: Kaufman De Dell Printing, Inc.--Reconsideration

DIGEST:

1. Protester has burden of affirmatively proving its case. Burden has not been met where conflicting statements are only evidence that contracting officer allegedly informed protester that if procuring activity received part of proposal lost in transit, protester could disregard initial rejection letter until it heard from contracting officer.
2. If protester were concerned that part of its proposal had been lost in transit, it should have protested within 10 working days after receipt of rejection letter, contending, among other things, that entire proposal may not have been evaluated. Protest filed more than 10 days after receipt of detailed rejection letter is untimely under 4 C.F.R. § 20.2(b)(2) (1977), even though only part of proposal was evaluated.
3. Protest that procuring activity rejected proposal because it intends to award contract to incumbent contractor is unsupported by record, and there is no showing of bias where incumbent's proposal was not highest ranked.
4. Competitive advantage of incumbent contractor need not be equalized where advantage does not result from Government preference or unfair action.

In Kaufman De Dell Printing, Inc., B-189570, November 23, 1977, 77-2 CPD 402, we denied the protest. Kaufman De Dell Printing, Inc. (Kaufman De Dell), now requests reconsideration of our decision.

On March 4, 1977, the National Aeronautics and Space Administration (NASA) issued request for proposals (RFP) 10-2-0037-7 for printing, reproduction, and documentation services. Kaufman De Dell forwarded its proposal to the

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procuring activity in three separate packages. Two of the packages, labeled "1 of 3" and "2 of 3," arrived on July 13, 1977, the day for receipt of proposals. The next day, NASA contacted Kaufman De Dell which stated that its proposal was contained in three packages and that it would attempt to locate the third package.

On August 11, 1977, the contracting officer sent Kaufman De Dell a letter detailing the reasons why NASA's technical evaluation committee considered its proposal to be technically unacceptable. Kaufman De Dell did not protest within 10 working days after receiving the initial rejection letter.

On August 15, 1977, the contracting officer received the third package from Kaufman De Dell which was marked "3 of 3." After evaluating the documents contained in the third package, NASA concluded that Kaufman De Dell's proposal was still technically unacceptable.

By letter dated August 30, 1977, the contracting officer informed Kaufman De Dell that the supplemental information contained in the third package had been evaluated, and NASA affirmed the rejection of its proposal. Kaufman De Dell protested within 10 working days after receiving the second rejection letter.

NASA contended that since Kaufman De Dell did not file a protest within 10 working days after receipt of the initial rejection letter, its protest was untimely under our Bid Protest Procedures, 4 C.F.R part 20 (1977).

With regard to NASA's contention, we stated that:

*** Kaufman De Dell's protest is untimely insofar as it relates to the rejection of its proposal. To be more specific, [the] initial rejection letter contained a rather detailed statement concerning the reasons why Kaufman De Dell's proposal was considered to be technically unacceptable. Kaufman De Dell knew or should have known the basis of its

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protest after the receipt of the letter. However, as NASA correctly states, Kaufman De Dell did not file its protest within 10 working days after receipt of the rejection letter. Accordingly, Kaufman De Dell's protest concerning the rejection of its proposal will not be considered on the merits. Robert Burger Associates, Inc., B-188450, June 1, 1977, 77-1 CPD 378; Jerry M. Lewis Truck Parts & Equipment, Inc., B-188960, June 27, 1977, 77-1 CPD 458. In this regard, GAO's Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1977), require that protests be 'filed' not later than 10 working days after the basis of the protest is known or should have been known, whichever is earlier. The term 'filed' means receipt by the contracting agency or this Office, whichever the case may be. 4 C.F.R. § 20.2(b)(3) (1977)."

Kaufman De Dell asserts that it was willing to change any part of its proposal to suit NASA's needs, and there were two reasons why it did not file a protest within 10 working days after receipt of the initial rejection letter. First, it was concerned that part of its proposal had been lost in transit. Second, the contracting officer, on August 15, 1977, informed Kaufman De Dell that if NASA received the third package, Kaufman De Dell could disregard the initial rejection letter until it heard from him.

The contracting officer categorically denies that he ever informed Kaufman De Dell that it could disregard the initial rejection letter. Moreover, if Kaufman De Dell had been so informed, a written record would have been made of the conversation, and the contracting officer would have sent Kaufman De Dell a letter confirming the conversation. There is no written record of any discussions with Kaufman De Dell on August 15.

The protester has the burden of affirmatively proving its case. We do not believe that the burden has been met, where, as here, conflicting statements of the parties concerning a conversation between the contracting officer and Kaufman De Dell constitute the only evidence. Reliable Maintenance Service, Inc., --request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

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If Kaufman De Dell had been concerned that part of its proposal may have been lost in transit, it should have protested after receipt of the initial rejection letter that the procuring activity, among other things, may not have evaluated its entire proposal. Based on the foregoing, we affirm our decision that Kaufman De Dell's protest regarding the rejection of its proposal is untimely under 4 C.F.R. § 20.2(b)(2) (1977) and not for consideration on the merits.

Kaufman De Dell also contends that NASA should not have provided 7 firms other than the incumbent contractor with the RFP, and thereby cause them to incur large expenditures in preparing proposals, since NASA apparently intends to award the contract to the incumbent, which has provided NASA with printing, reproduction, and documentation services for 12 years.

Kaufman De Dell's supposition that NASA intends to award the contract to the incumbent appears to be based on NASA's rejection of Kaufman De Dell's proposal. There is no evidence of record that NASA intends to award the contract to the incumbent. In fact, the incumbent's proposal was not the highest ranked, which indicates that NASA is not biased as Kaufman De Dell alleges.

Kaufman De Dell also protests NASA's refusal to postpone the day for receipt of proposals, so that Kaufman De Dell could acquire additional data under the Freedom of Information Act which it could use in preparing its proposal. This matter was thoroughly considered in our decision of November 23, 1977; consequently, further consideration is unwarranted.

Finally, Kaufman De Dell protests that since the incumbent contractor has an unfair advantage, the incumbent should not have been allowed to submit an offer. More specifically, it is argued that the incumbent has knowledge of the procuring activity's legitimate needs and it has personal contact with the procuring activity.

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Our Office has recognized that firms may enjoy a competitive advantage by virtue of being an incumbent contractor. As long as the advantage is not the result of Government preference or unfair action, there is no requirement for equalizing the competition. Burroughs Corporation, B-189752, B-190222, November 29, 1977, 77-2 CPD 421. We have found no evidence of preference or unfair action in the instant procurement.

Since there has been no showing that our prior decision was in error as a matter of fact or law, it is affirmed.


Deputy Comptroller General
of the United States