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KLEMAN
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DECISION



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

FILE: B-189570

DATE: November 23, 1977

MATTER OF: Kaufman De Dell Printing, Inc.

DIGEST:

1. Determination of date to be specified for receipt of proposals is matter of judgment properly vested in contracting agency. Where it appears that all offerors competed on equal footing, adequate time was allotted and sufficient information was provided for formulation of proposals, and there was no indication prior to date set for receipt of proposals that adequate competition would not be obtained, we cannot find that contracting officer acted arbitrarily or capriciously by not postponing date set for receipt of proposals until protester's Freedom of Information Act appeal had been resolved.
2. GAO has no authority under Freedom of Information Act to determine what information must be disclosed by other Government agencies. Freedom of Information Act confers exclusive jurisdiction upon Federal District Courts to order disclosure of appropriate documents.
3. Protest filed almost 2 months after date set for receipt of proposals alleging improprieties in solicitation is untimely under 4 C.F.R. § 20.2(b)(1) (1977) and not for consideration on merits.
4. Question concerning small business size status of offeror is not for consideration by GAO since conclusive authority over such question is vested by statute in SBA.
5. Offeror shipped proposal in three separate packages. Two packages arrived before time set for receipt of proposals. Third package arrived over 1 month later. After evaluating proposal documents contained in first two packages, procuring activity sent offeror rejection letter detailing reasons why proposal was considered to be technically unacceptable. Since offeror knew or should have known basis of protest

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after receipt of initial rejection letter but did not protest within 10 working days after receipt, protest concerning final rejection of proposal is untimely under 4 C.F.R. § 20.2(b)(2) (1977) and not for consideration on merits.

6. Since GAO Bid Protest Procedures were published in Federal Register, publication constitutes constructive notice thereof.

On March 4, 1977, the John F. Kennedy Space Center (KSC) issued request for proposals (RFP) 10-2-0037-7 for printing, reproduction, and documentation services. The RFP requested that cost and technical proposals be submitted covering a contract period of 1 year plus two 1-year options. After several amendments to the RFP were issued, KSC established July 13, 1977, as the date set for receipt of proposals.

By letter dated June 13, 1977, Kaufman De Dell Printing, Inc. (Kaufman De Dell), submitted a Freedom of Information Act request to KSC for copies of the current contract schedules with amendments and the incumbent contractors' technical and cost proposals. The contract schedules and amendments were provided to Kaufman De Dell; however, KSC informed Kaufman De Dell that the technical and cost proposals were exempt from disclosure under the Freedom of Information Act, specifically 5 U.S.C. § 552(b)(4) (1970).

By letter of July 9, 1977, Kaufman De Dell appealed KSC's determination to the Administrator of the National Aeronautics and Space Administration (NASA). Concurrent with its appeal, Kaufman De Dell protested to the contracting officer requesting that the date set for receipt of proposals be delayed until its appeal had been resolved, and it had an opportunity to utilize the requested information in formulating its proposal. Kaufman De Dell filed an identical protest with our Office.

The contracting officer declined to extend the date set for receipt of proposals. On July 13, 1977, six proposals and two alternatives were received, including a proposal submitted by

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Kaufman De Dell. NASA subsequently determined that Kaufman De Dell's proposal was technically unacceptable.

Kaufman De Dell's grounds for protest here, in substance, are as follows:

1. The date set for receipt of proposals should have been postponed as requested, especially since NASA had extended the date for receipt of proposals for its convenience.
2. The General Accounting Office should determine whether information is exempt from disclosure under the Freedom of Information Act or it should recommend or establish an organization to make such determinations.
3. The small business set-aside standard in the RFP was improper. The standard should have set a lesser dollar amount and a definite figure for the number of employees.
4. The RFP did not provide prospective offerors with sufficient information concerning NASA's legitimate needs.
5. An incumbent contractor and offeror may not be a small business.
6. Its proposal was technically acceptable. In addition, NASA should not have determined that its proposal was nonresponsive before negotiations had been conducted with other offerors and before the award date.
7. GAO should determine that offerors are entitled to an adequate explanation regarding the rejection of their proposals. GAO should also determine that offerors are entitled to be advised of their right to protest.

The determination of the date to be specified for receipt of proposals is a matter of judgment properly vested in the contracting agency, and we will not substitute our judgment unless it appears that the decision of the agency was arbitrary or capricious. Multi-Service Maintenance Corporation, B-187372, B-188030, May 20, 1977, 77-1 CPD 353.

In the instant case, it appears that all offerors competed on an equal footing without knowledge of the incumbent contractors' costing methods; adequate time was allotted for formulation of proposals; and there was no indication prior to the date set for receipt of proposals that adequate competition would not be obtained. Under the circumstances, we cannot find that the contracting officer acted arbitrarily or capriciously by not postponing the date set for receipt of proposals as requested by Kaufman De Dell. Although Kaufman De Dell contends that NASA had extended

the date for receipt of proposals for its own convenience, the record indicates that the extensions were granted so that the Department of Labor could resolve the issue of including a manning provision of a labor agreement in a Service Contract Act wage determination, and also to give to prospective offerors sufficient time to consider several amendments to the RFP in preparing their proposals.

In connection with Kaufman De Dell's second ground of protest, it requests that we reconsider our holding in DeWitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47. In that case, we held in pertinent part that GAO has no authority under the Freedom of Information Act, 5 U.S.C. § 552 et seq., to determine what information must be disclosed by other Government agencies. Kaufman De Dell contends, however, that GAO should determine whether information is exempt from disclosure or that we recommend or establish an organization to make such determinations. In DeWitt Transfer and Storage Company, supra, we correctly stated that Federal District Courts are vested by statute with exclusive jurisdiction to order the disclosure of documents under the Freedom of Information Act. See 5 U.S.C. § 552(a)(3) (1970). Therefore, it is clear that such a forum exists for making such determinations.

Allegation 3 (improper small business size standard in RFP) and allegation 4 (RFP did not adequately set forth NASA's legitimate needs) challenge the propriety of the solicitation. Since the alleged improprieties are evident on the face of the solicitation and Kaufman De Dell's protest concerning these matters was not filed with our Office until September 12, 1977, or almost 2 months after the date set for receipt of proposals, it is untimely under 4 C.F.R. § 20.2(b)(1) (1977) and not for consideration on the merits.

Concerning the fifth ground of protest, under 15 U.S.C. § 637(b)(6) (1970), the Small Business Administration has been granted conclusive authority to determine matters of small business size status for procurement purposes. Therefore, our Office will not review questions concerning an offeror's small business size status. Merritt Enterprises, Inc.; American Coin Meter; American Dryer Corporation, B-186412, June 16, 1976, 76-1 CPD 388.

Kaufman De Dell forwarded its proposal to the procuring activity in three separate packages. Two of the packages were received on July 13, 1977, the date for receipt of initial proposals. The packages were marked "1 of 3" and "2 of 3." The next day, NASA

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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 as contained in packages 1 of 3 and 2 of 3 to be technically unacceptable. The letter stated in part that:

"Your proposal submitted in response to the subject RFP has been carefully evaluated and determined to be technically unacceptable.

"The basis for this determination is summarized as follows:

"1. Key Personnel: The resumes of the personnel submitted for the key positions of project manager; publications supervisor; documentation supervisor, and administrative supervisor indicate that these personnel did not meet the experience requirements of the RFP and, thus, are considered inadequate.

"2. Management Plan: The plan submitted was not in compliance with RFP requirements. For example, the project manager's authorities and responsibilities in relation to the corporate structure are not clearly defined, and interfaces between the project manager and subordinate supervisors are not reflected.

"3. Operating Plan: The operating plan did not relate the RFP requested information such as the work order control plan and the plan for handling priority work scheduling conflicts.

"4. Understanding the Requirement: The overall proposal did not reflect a clear understanding of the general objectives and specific requirements of the RFP as demonstrated by the inadequacy and lack of response in several areas such as appropriateness of management policies and objectives and proposed organizational structure. No assessment could be made of the realism of the proposer's total plan for compensation because no compensation plan was provided.

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"Further, the proposal was totally lacking in completeness and sufficient detail with respect to cost data. No supporting detail was submitted for quoted total estimated costs."

Kaufman De Dell did not protest within 10 days after receiving the contracting officer's initial rejection letter.

On August 15, 1977, the contracting officer received package "3 of 3." The NASA technical evaluation committee which evaluated the documents contained in the first two packages evaluated the documents contained in the third and 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's rejection of its proposal was affirmed.

On September 6, 1977, Kaufman De Dell wrote to the contracting officer stating:

"Re: Your letter of 30 August 1977

"We are protesting your action and a letter will follow."

By letter dated September 9, 1977, to NASA, KSC, and our Office, Kaufman De Dell protested the rejection of its proposal. More specifically, Kaufman De Dell contends in substance that the documents contained in the third package provided the information which the NASA technical evaluation committee found lacking in the documents in the first two packages. Consequently, its proposal should not have been rejected as technically unacceptable.

With regard to allegation 6, NASA states in substance that since KSC's August 11 rejection letter constituted initial adverse agency action, Kaufman De Dell was obligated under GAO's Bid Protest Procedures, 4 C.F.R. part 20 (1977), to file its protest within 10 working days after receipt of the letter. Therefore, since


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Kaufman De Dell's protest was not filed until September 12, 1977, its protest is untimely.

We agree that Kaufman De Dell's protest is untimely insofar as it relates to the rejection of its proposal. To be more specific, KSC's 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 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).

With regard to allegation 7, there is no evidence of record which indicates that other offerors have not received an adequate explanation regarding the rejection of their proposals. If any offeror feels that its proposal was improperly rejected, it may file a protest with the contracting agency or with our Office. Our current Bid Protest Procedures were published in their entirety in volume 40, No. 80 of the Federal Register at pages 17979 and 17980 (April 24, 1975). Such publication constitutes constructive notice of those provisions. Catalytic, Incorporated, B-187444, November 23, 1976, 76-2 CPD 445.

Based on the foregoing, the protest is denied.


Deputy Comptroller General
of the United States