



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: United Marine International LLC

File: B-281512

Date: February 22, 1999

Harry R. Silver, Esq., Ober, Kaler, Grimes & Shriver, for the protester.
Willie J. Williams, Esq., Army Corps of Engineers, for the agency.
Christina Sklarew, Esq., and Paul Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to conduct discussions with protester consistent with the requirements of part 15 of the Federal Acquisition Regulation (FAR) is denied where the procurement is a commercial item acquisition being conducted under simplified acquisition procedures, which is not subject to the FAR part 15 requirements.

DECISION

United Marine International LLC protests the issuance of a purchase order by the Army Corps of Engineers (Corps) to D&D Products, Inc. under request for quotations (RFQ) No. DACW69-98-Q-0328 for a debris collection vessel with trailer and shore conveyor to be used on Fishtrap Lake in Kentucky. United objects that the Corps improperly conducted discussions with D&D after the submission of quotations, without holding any discussions with the protester as required by part 15 of the Federal Acquisition Regulation (FAR).

We deny the protest.

The Corps's Huntington, West Virginia office initially posted a notice of the procurement in the Commerce Business Daily (CBD) on September 18, 1998, synthesizing its intention "to commercial item procure" the debris collection vessel on a sole-source basis from United. The CBD notice provided performance characteristics that the equipment was required to satisfy, and stated that the equipment must meet the FAR § 2.101 definition of a "Commercial item." Because several vendors responded to the notice, representing that they could satisfy the described requirements, the Corps decided to seek competition for the requirement. Accordingly, on September 24, the Corps issued an RFQ as a total small business set-aside, under the special procedures of FAR part 12 for the acquisition of commercial items, incorporating by reference the four clauses required to be included in such solicitations. RFQ at 1. The procurement was handled under the test program using simplified acquisition procedures for commercial items which is

authorized by FAR subpart 13.5. The RFQ included performance specifications in Section C and, in Section H, advised vendors to furnish sufficient information, such as descriptive literature, to enable the contracting officer to evaluate the offered equipment's compliance with the specifications.

In response, the Corps received the following four quotations:

Vendor A	\$495,000
United	\$438,098
D&D	\$311,500
Vendor B	\$106,500

The agency determined that the equipment in the low-priced quotation did not meet the agency's specifications; the equipment offered by United and D&D was found to be compliant with the RFQ's technical requirements. Both quotations contained exceptions to the delivery schedule, but the Corps considered the exceptions acceptable. In addition, United's quotation contained progress payment terms that the Corps did not consider acceptable. Contracting Officer's Statement at 5-6.

D&D had listed in its quotation a number of optional items or upgrades that were available, such as air conditioning and heating for the cab of the vessel, and a stainless steel configuration. The Corps considered these options and decided to add a number of features that had not been required by the specifications. The contract specialist met with D&D to discuss the addition of optional features, and D&D was permitted to submit a revised quotation adding certain of the features, as a result of which D&D's quote was increased to \$376,224. The Corps determined to purchase the equipment from D&D on the basis of its low price, and issued a purchase order to D&D on October 29. On November 4, the Corps received D&D's signed acceptance. This protest followed.

United protests that the Corps violated a number of provisions in part 15 of the FAR by holding what it characterizes as discussions only with D&D, and permitting that firm to submit a revised quotation.¹ United also argues that because the RFQ did not indicate that the source selection would be based on price alone, United

¹While United also alleged in its protest that the Corps had misled the firm into submitting a quotation for more expensive equipment than the Corps required, placing it on uneven competitive footing with other vendors, after receiving the agency report which provided the Corps's explanation and rebuttal, the protester did not mention this contention in its comments, and we deem the allegation abandoned. TMI Servs., Inc., B-276624.2, July 9, 1997, 97-2 CPD ¶ 24 at 4 n.3.

"reasonably believed that the evaluation would be on a best value to the government basis, and that an award would be made after negotiation." Protester's Comments at 3.

The Corps's position is that this procurement was not conducted as a competitive negotiated procurement under part 15 of the FAR, but as a simplified acquisition under the procedures set forth in part 13 of the FAR. While United argues that the solicitation fails to inform vendors that simplified acquisition procedures were to govern the procurement, the RFQ clearly states that the procurement is a commercial item acquisition. The RFQ was issued on Standard Form 1449, which bears the legend "SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS," and incorporates by reference the FAR clauses required for commercial item solicitations. RFQ at 1.

Part 13 of the FAR prescribes the policies and procedures for the acquisition of supplies and services, including commercial items for which the aggregate price does not exceed the simplified acquisition threshold amount of \$100,000. Subpart 13.5 includes special authority to use simplified procedures for acquisitions of commercial items exceeding the simplified acquisition threshold of \$100,000 but not exceeding \$5,000,000, as a test program, where the contracting officer reasonably expects that offers will include only commercial items. FAR § 13.500(a) (FAC 97-03). This subpart requires contracting activities to "employ the simplified procedures authorized by the test to the maximum extent practicable" for the period of the test. FAR § 13.500(b). It specifies that the requirements set forth in part 12 of the FAR apply when acquiring commercial items using the procedures in part 13.

FAR part 12 prescribes policies and procedures unique to the acquisition of commercial items and implements the preference established by, and the specific requirements in, the Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. § 2377 (1994), for the acquisition of commercial items that meet the needs of an agency. FAR part 12 establishes acquisition policies more closely resembling commercial practices, as well as other considerations necessary for proper acquisition planning, solicitation, evaluation, and award of contracts for commercial items. FAR part 12 also specifies the solicitation provisions and clauses required when acquiring commercial items.

In particular, FAR subpart 12.3 sets forth four clauses which must be incorporated into solicitations for commercial items and one clause which is optional. As a general rule, such solicitations are to include "only those clauses . . . [r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items . . . or . . . [d]etermined to be consistent with customary commercial practice." FAR § 12.301(a). FAR § 12.301(b) lists the four mandatory clauses: (1) "Instructions to Offerors--Commercial Items" (FAR § 52.212-1); (2) "Offeror Representations and Certifications--Commercial Items" (FAR

§ 52.212-3); (3) "Contract Terms and Conditions--Commercial Items" (FAR § 52.212-4); and (4) "Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items" (FAR § 52.212-5). All of these clauses were incorporated by reference on the first page of the RFQ. The optional clause which is to be used when FAR part 15 type procedures may be contemplated, that is, "[w]hen the use of evaluation factors is appropriate," FAR § 12.301(c), was not included or incorporated.

In view of these solicitation provisions, United's position that the requirements under part 15 of the FAR are applicable is misplaced. The Corps was not required to follow the FAR provisions United cites because they are inapposite to a commercial item acquisition conducted under simplified acquisition procedures. Where, as here, simplified acquisition procedures are used, contracting agencies are to use innovative approaches to the maximum extent practicable in order to award contracts in the manner that is most suitable, efficient and economical in the circumstances of each acquisition. FAR § 13.003(g),(h); see Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 at 2. Further, FAR § 13.106-2(b) encourages the evaluation of quotations in an efficient and minimally burdensome fashion and explicitly states that the evaluation procedures provided for in part 15 are not mandatory, nor is a formal evaluation plan, the establishment of a competitive range, or the conducting of discussions required. Our Office reviews allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with the concern for fair and equitable competition that is inherent in any federal procurement. Huntington Valley Indus., B-272321, Sept. 27, 1996, 96-2 CPD ¶ 126 at 2.

We think the Corps's actions here were consistent with this standard. Faced with a low-priced quotation meeting its specifications on the one hand, and a significantly higher-priced quotation that included unacceptable payment terms on the other, the Corps's selection of the D&D quotation was essentially required by the terms of the RFQ. Inasmuch as this is a commercial acquisition which did not include the optional technical evaluation clause called for by FAR § 12.301(c) where a relative technical evaluation is contemplated, selection of the lowest priced technically acceptable quotation was required. Vistron, Inc., B-277497, Oct. 17, 1997, 97-2 CPD ¶ 107 at 4. This is consistent with the general rule that, where a solicitation does not contain evaluation factors other than price, price is the sole evaluation criterion. AMBAC Int'l, B-234281, May 23, 1989, 89-1 CPD ¶ 492 at 3 n.2.

In light of the fact that the procurement was conducted under simplified acquisition procedures, the agency's election to include certain optional items and accept a revised quotation from the low-priced, acceptable vendor (which quotation remained low after the revisions) was consistent with the simplified procedures' purpose of allowing flexibility and innovative approaches. While the protester argues now that it could have offered lower prices or could have offered the same options if the Corps had held discussions with United, the fact remains that United

submitted a quotation that was qualified by terms viewed as unacceptable, and the Corps was not here required to engage in discussions with United for the purpose of making its offer acceptable, or otherwise improving its terms.

Further, to the extent United is alleging that the solicitation should have provided for a comparative technical evaluation and cost/technical tradeoff analysis, the allegation is untimely, since it was clear that the RFQ provided for no such analysis. Protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial offers must be filed prior to that time.² 4 C.F.R. § 21.2(a)(1) (1998).

The protest is denied.

Comptroller General
of the United States

²United also alleges that the agency provided it with neither timely notice of award nor a debriefing. Simplified acquisition procedures do not specifically require such notice, and in any event, failure on the agency's part to provide timely notification to United is a procedural matter which does not affect our denial of the protest on its merits. Since the protest is denied, the protester was not prejudiced by any delay in notification. See Criterion Corp., B-266050, Jan. 23, 1996, 96-1 CPD ¶ 217 at 5 n.1.