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

B-178212

August 31, 1973

Swedlow, Inc.
c/o Gold and Gold
Attorneys at Law
144 South Beverly Drive
Beverly Hills, California 90212

Attention: Harold Gold, Esq.

Gentlemen:

Reference is made to your letter of May 17, 1973, and prior correspondence, protesting against award of a contract to any other bidder under invitation for bids (IFB) N00197-73-B-0215, issued by the Naval Ordnance Station, Louisville, Kentucky (NOSL), on February 22, 1973. It is your contention that a contract should have been awarded to Swedlow, Inc., under request for proposals (RFP) N00197-73-R-0018, previously issued by the same agency on November 3, 1972.

The RFP covered the furnishing of 140 glass reinforced plastic weathershields on a multiyear basis. The closing date for receipt of proposals was December 16, 1972. Eight offers were submitted, the lowest of which was that of CTL-Dixie, Inc. Following receipt of proposals, negotiations were conducted with all offerors, each of which was notified by telegram that it could submit its best and final offer no later than 4 p.m., December 23, 1972, at which time negotiations would close. At the close of this round of negotiations, Swedlow had replaced CTL as the low offeror, having made a reduction in its unit price for the multiyear items from $10,930 to $9,767.

As a result of these negotiations, the Government was prepared to make an award to Swedlow. However, a preaward review of the proposed contract revealed that the wrong defective pricing clauses had been specified in the RFP. Also, it was questioned as to whether Swedlow had in fact taken several exceptions to the terms and conditions of the RFP or if it had merely "requested" such changes. Neither of these discrepancies had been corrected during negotiations. Therefore, NOSL determined that the solicitation should be amended to insert the correct clauses, and on January 9, 1973, negotiations were opened for a second time, best and final offers being requested no later than 4 p.m. on January 17, 1973.

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Concerned about entering a second round of negotiations, a representative from Swedlow contacted counsel for NOSL. The basis for its concern was the allegation that an employee of NOSL had informed Swedlow's closest competitor, CTL-Dixie, that Swedlow was the former low offeror and that most likely Swedlow's price on the RFP had been leaked to the competition. Upon investigation by NOSL, these allegations were borne out. Furthermore, it was discovered during the course of the investigation that certain drawings and specifications had been substantially revised by the requiring activity. In light of all of these circumstances, the contracting officer made the determination to cancel the second round of negotiations and to reprocure the shields at a later date. All offerors were advised of this determination by telegram dated January 11, 1973. None of the offerors protested the decision to cancel at that time.

On February 22, 1973, the requirement for the shields was resolicited under IFB N00197-73-B-0215. The solicitation contained revised drawings and specifications. Eight bids were submitted under the IFB, the two low of which (for the multiyear items) were at identical prices and both below the bid of Swedlow.

The day after bid opening, March 16, 1973, Swedlow filed a formal protest with our Office protesting against award of a contract under the IFB and against all of the actions taken by NOSL after the close of the first round of negotiations on December 28, 1972. It is Swedlow's contention that it is entitled to an award under the initial RFP.

Before reaching the merits of this protest, there is a significant timeliness question that must be considered. Swedlow's protest is based upon alleged improprieties in the solicitation procedure. However, these improprieties (the price leak, the reopening of negotiations and the change from an RFP to an IFB) were all apparent prior to the opening of bids on March 15, 1973. Our Interim Bid Protest Procedures and Standards, 4 CFR 20.2(a), state that:

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

The improprieties alleged here were apparent and all prior to bid opening. On this basis, the protest filed after bid opening appears to have been untimely filed under our above regulation.

Nevertheless, counsel for Swedlow, recognizing the untimeliness under section 20.2(a), has sought to have this protest considered under section 20.2(b) of our Interim Bid Protest Procedures and Standards. That provision reads:

> "The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely."

It is our opinion that the issue raised questioning the action taken by the contracting officer under the circumstances prevailing at the close of the first round of negotiations is one of significance to procurement procedures.

Turning then to the merits of the protest, Swedlow makes several contentions. It first contends that it was authorized to include in its proposal a request to delete an option providing for exercise 90 days prior to final delivery and substitute therefor a 30-day after-award option provision, as well as requests for other changes, by a representative of NOSL. Swedlow further contends that inclusion of such requests did not qualify its proposal to render it unacceptable without further negotiation. The Swedlow representative spoke with Mr. Edward Mickey (Head of the NOSL Programs Management Office), Mr. James H. Archer (contract negotiator) and Mr. Fred W. Cross (contracting officer) concerning its "requests" for proposal changes. However, Mr. Mickey is a technical employee of NOSL without contracting authority. That being the case, any commitments made by Mr. Mickey did not bind the contracting officer or otherwise constitute authorization to deviate from the RFP provisions. Further, Mr. Cross has sworn in an affidavit that he made no such representations to Swedlow, only that such changes should be discussed with Mr. Archer. Mr. Archer alleges that he told Swedlow that the option provision would not be changed to a shorter period. Also, he claims that if such a decision to shorten the option period was to be made, an amendment to the RFP would be necessary to place all offerors on the same footing.

This dispute of fact as to what Swedlow was actually told to do concerning its requests for changes has not been refuted by Swedlow by convincing evidence to the contrary. Rather, the administrative version seems to be in consonance with the tenor of the record wherein it is shown that the preservation of the competitive character of the procurement required cancellation of the RFP.

Swedlow next alleges that even if its offer did contain exceptions to the RFP, it was willing to withdraw such exceptions on its own or through an additional negotiation session. We feel that this would have been prejudicial to all other offerors. To allow Swedlow to submit one proposal and then alter it to obtain the award would have been in contradiction with the finality accorded the close of negotiations. As was stated in our decision 51 Comp. Gen. 479, 481 (1972)--

"We have reviewed several of our more recent decisions bearing on the question of what constitutes discussions and conclude that resolution of the question has depended ultimately on whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from action initiated by the Government or the offeror. Consequently, an offeror's late confirmation as to the receipt of an amendment and its price constituted discussions (50 Comp. Gen. 202 (1970)), as does a requested 'clarification,' which result in a reduction of offer price (48 Comp. Gen. 663 (1969)) and the submission of revisions in response to an amendment to a solicitation (50 Comp. Gen. 245 (1970)). On the other hand, an explanation by an offeror of the basis for its price reductions without any opportunity to change its proposal was held not to constitute discussions (B-170939, B-170990, November 17, 1971). We believe, therefore, that a determination that certain actions constitute discussions must be made with reference to the opportunity for revision afforded to offerors by those actions. If the opportunity is present, the actions constitute discussions."

Applying this rule to the specific situation at hand, we are of the opinion that Swedlow's offer of shortening the option provision provided it with the opportunity to change its proposal and, thus, constituted discussions. Since discussions with one offeror necessitate discussions with all offerors within the competitive range (see 50 Comp. Gen. 208 (1970)), the contracting officer's contention that Swedlow's proposal could not be accepted without reopening negotiations is well taken. Therefore, Swedlow's offer was unacceptable at the close of the first round of negotiations.

In view of the above, it is our opinion that the contracting officer was justified in not awarding a contract to Swedlow under the RFP. Therefore, we need not discuss the other contentions you raise and your protest is denied.

However, there remains for consideration the question of what course of action the contracting officer should have taken when he learned of the price leak after the close of negotiations. In our opinion, the course of action chosen by the contracting officer was proper under the circumstances. The record demonstrates that negotiation was no longer feasible since formal advertising became practicable with the changes in specifications. While it is regrettable that Swedlow's price was leaked during the course of negotiations, the contracting officer had reason not to continue negotiations when to do so would have subjected the procurement process to charges of further irregularity and auction techniques. Though it may be argued, with some merit, that the prejudice to Swedlow

outweighed the advantages of cancellation and resolicitation on a formal competitive basis, we cannot say on the record before us that the course of action followed did not represent a reasoned exercise of procurement judgment. The protest is therefore denied.

Sincerely yours,

Paul G. Dembling
For the Comptroller General
of the United States