**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Carter Chevrolet Agency, Inc.

File: B-270962; B-270962.2

Date: May 1, 1996

Robert H. Koehler, Esq., and Lynn T. Burleson, Esq., Patton Boggs, L.L.P., for the protester.
Seth Binstock, Esq., General Services Administration, for the agency.
Behn Miller, Esq., and Christine S. Melody, Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly determined that awardee satisfied a definitive responsibility criterion requiring it to provide letter of commitment from automobile manufacturer is denied where the agency reasonably determined that letter of commitment constituted evidence of manufacturer's agreement to provide required vehicles in accordance with the requirements of the solicitation.

2. Protest that agency improperly allowed awardee to demonstrate compliance with definitive responsibility criterion after time set for submission of best and final offers is denied since evidence of compliance with matters of responsibility--such as definitive responsibility criteria--may be provided any time up to actual award.

3. General Accounting Office will not consider challenges to contracting officer's affirmative determination of awardee's responsibility absent evidence of bad faith; protester's contention that contracting officer improperly failed to further investigate awardee's responsibility based on protester's unsubstantiated allegations of impropriety by awardee does not meet this standard.

DECISION

Carter Chevrolet Agency, Inc. protests the award of a contract to McCombs Fleet Services, Inc. under request for proposals (RFP) No. FCAP-X2-FLT96-N, issued by the General Services Administration (GSA) to obtain commercially available two-wheel drive and four-wheel drive "light" trucks and similar passenger vehicles. Carter contends that the agency improperly waived a definitive responsibility criterion for the awardee, and that the contracting officer otherwise improperly determined McCombs to be a responsible contractor.

We deny the protest.

The RFP was issued on August 18, 1995, and contemplated the award of multiple firm, fixed-price requirements contracts to the lowest priced, technically acceptable offeror for each "group" of vehicle contract line item numbers (CLIN), which were organized in the RFP's pricing schedule according to vehicle specifications and manufacturer. At issue in this protest is the award of Group 17, which required offerors to provide various quantities of two-wheel drive passenger vans manufactured by General Motors Corporation (GMC).

By the October 4 closing date, McCombs and Carter submitted proposals for various CLIN vehicle groups; with respect to Group 17, the protester and McCombs were the sole offerors.

On November 8, the contracting officer issued a facsimile letter to McCombs advising the firm that several technical deviations in its offer were unacceptable. On November 17, GSA issued an amendment to the RFP which revised several of the RFP's vehicle specifications, established a time for submission of best and final offers (BAFO), and--of significance to this protest--required all nonmanufacturer offerors to submit a manufacturer's letter of commitment with their BAFOs demonstrating that each manufacturer of the proposed vehicles had committed itself to act as the offeror's source of supply for that vehicle group.

With its BAFO, McCombs submitted commitment letters from the following manufacturers: GMC Truck, Pontiac, Jeep, and Ford Motor Company. Although the commitment letter for Group 17 was submitted by GMC Truck on a letter specifically addressed to "McCombs Fleet Services," the commitment letters from the other vehicle manufacturers were addressed to different entities--i.e., "McCombs Jeep Eagle/Fleet Services" and "McCombs Pontiac-GMC." On December 7, the contracting officer issued a letter to McCombs advising it that the commitment letters from Ford, Jeep, and Pontiac were deficient as they were not addressed to McCombs by the name on its proposal--McCombs Fleet Services. Additionally, with respect to the commitment letter from GMC Truck, the contracting officer advised McCombs that the commitment was deficient because it "fails to identify the items for which you are submitting an offer and indicates [vehicle] shortages and a cut-off date."[1] The contracting officer directed McCombs to verify its BAFO--including correcting the letters of commitment--by December 11.

On December 13, by means of a facsimile letter, McCombs requested additional time from the contracting officer to correct its GMC Truck commitment letter. By facsimile letter dated that same day, the contracting officer denied this request on the ground that further delays were not in the government's best interests; the

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[1]The cut-off date pertained to "G model" vehicles, which are not part of the Group 17 vehicle category.

contracting officer advised the firm that she was referring her questions regarding the GMC Truck commitment letter--along with other matters concerning McCombs' ability to perform the contract--to the Small Business Administration (SBA) for review as a responsibility matter under that agency's Certificate of Competency (COC) procedures. See 15 U.S.C. § 637(b)(7)(A) (1994). The contracting officer also asked McCombs to extend its offer acceptance period in order to permit the SBA to complete its COC review.

By facsimile dated December 14, McCombs advised the contracting officer that it had extended its offer acceptance period, and further requested the name of the appropriate SBA official to contact regarding the COC review. On December 19, McCombs submitted a revised commitment letter from GMC Truck to the contracting officer, as well as a copy of its registration statement from the state of Texas. The registration notice showed that McCombs Austin, Inc. was registered to do business as McCombs Fleet Services.

After receiving this December 19 correspondence, as well as a pre-award survey affirming McCombs' responsibility and recommending award to the firm, the contracting officer changed her mind about referring the issue of McCombs' responsibility to the SBA for COC review, and instead awarded the contract for Group 17 to McCombs as the lowest priced, technically acceptable, responsible offeror. On January 23, 1996, shortly after being advised of the award decision, Carter filed this protest.

Manufacturer's Letter of Commitment Requirement

As noted above, by means of amendment No. 0003, the RFP incorporated the following letter of commitment requirement:

> "Offeror[s] other than the manufacturer are required to provide the contracting officer with a letter of commitment from the manufacturer which will assure the offeror of a source of supply sufficient to satisfy the government's requirements for the contract period, or evidence that the offeror will have an uninterrupted source of supply from which to satisfy the government's requirements for the contract period. The letter of commitment must be submitted with your [BAFO]."

In its protest, Carter contends that the amended GMC Truck letter of commitment submitted by McCombs on December 19 is deficient, and, consequently, the agency improperly waived a definitive responsibility criterion for McCombs. First, Carter maintains that because the letters of commitment from other vehicle manufacturers identified McCombs by a different name, the enforceability of the awardee's commitment letter from GMC is questionable. Additionally, the protester maintains

that because McCombs' GMC Truck letter of commitment was submitted after the time set for submission of BAFOs, the agency was precluded from accepting the revised letter.

Definitive responsibility criteria are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor's ability to perform the contract; the criteria limit the class of contractors to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance, e.g., unusual expertise or specialized facilities. See Federal Acquisition Regulation (FAR) § 9.104.2; Gelco Servs., Inc., B-253376, Sept. 14, 1993, 93-2 CPD ¶ 163, recon. denied, B-253376.2, Oct. 27, 1993, 93-2 CPD ¶ 261. In this case, there is no dispute by any of the parties that the manufacturer's letter of commitment clause at issue in this protest constitutes a definitive responsibility criterion since it establishes a specific and objective standard to measure the offeror's ability to perform. See Software City, B-217542, Apr. 26, 1985, 85-1 CPD ¶ 475 (specification requiring each offeror of software to obtain a manufacturer's letter of commitment for each product offered guaranteeing the supply of the product to the offeror for the term of the contract is a definitive responsibility criterion).

Where, as here, a protester alleges that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criterion has been met; generally, a contracting agency has broad discretion in determining whether offerors meet definitive responsibility criteria since the agency must bear the burden of any difficulties experienced in obtaining the required performance. Prime Mortgage Corp., 69 Comp. Gen. 618 (1990), 90-2 CPD ¶ 48. The relative quality of the evidence is a matter within the contracting officer's judgment; however, the official may only find compliance with the definitive responsibility criterion based on adequate objective evidence. Tutor-Saliba Corp. et al., B-255756, Mar. 29, 1994, 94-1 CPD ¶ 223. Given that the GMC Truck letter identifies the CLIN, vehicle model number, and guaranteed minimum quantity of CLIN vehicles which GMC Truck will provide to McCombs in support of that offeror's Group 17 contract, we think that the contracting officer reasonably concluded that McCombs satisfied the manufacturer's letter of commitment requirement here.

While the protester contends that the letters of commitment submitted by other vehicle manufacturers for non-GMC vehicle groups render the identity of McCombs ambiguous because they refer to McCombs by a name different from what appears on its proposal, the record does not support this contention with respect to the Group 17 contract award. Simply stated, the GMC Truck letter of commitment for Group 17 specifically identifies McCombs by its proposal name--McCombs Fleet Services--and guarantees a source of supply for each GMC vehicle proposed by

McCombs in accordance with the terms of the RFP. Consequently, we see no basis to conclude that the contracting officer acted unreasonably in determining that McCombs met the letter of commitment definitive responsibility criterion.

To the extent Carter objects to McCombs' GMC Truck letter of commitment on the ground that it was submitted and accepted after the time set for submission of BAFOs, we note that because definitive responsibility criteria involve matters of responsibility, evidence of compliance with such provisions may be provided any time up to actual award. Id.

Other Responsibility Challenges

In early January 1996, Carter contacted the contracting officer and advised her that several different companies had filed registrations to use the assumed name of "McCombs Fleet Services." Carter also advised the contracting officer that one of those entities--McCombs Austin--had been rejected from GMC's bid assistance program, which offers "invoice credits" to participating dealers and ultimately allows them to provide vehicles to the customer at lower prices. In this regard, the record shows that another entity that was registered to use the McCombs Fleet Services name--Red McCombs Pontiac-GMC Truck--had been admitted by GMC to the same bid assistance program from which McCombs Austin had been rejected.

Carter contends that once the contracting officer received this information, she was required to further investigate McCombs' responsibility. Had she done so, Carter contends, the contracting officer would have discovered numerous FAR violations by the awardee; specifically, Carter alleges that McCombs improperly entered into a prohibited contingent fee arrangement with Red McCombs to use that firm's bid assistance membership in order to offer lower prices, see FAR § 3.401, and that McCombs improperly failed to disclose its teaming arrangement with Red McCombs in its offer, in contravention of FAR § 9.603. Carter also contends that because McCombs allegedly relied on assistance from Red McCombs, its Certificate of Independent Price Determination is false. Alternatively, Carter contends that McCombs submitted a below-cost offer.

Before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. FAR § 9.103(b). The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer, who, in making that determination, must

of necessity rely on his or her business judgment. See Garten-und Landschaftsbau GmbH Frank Mohr, B-237276; B-237277, Feb. 13, 1990, 90-1 CPD ¶ 186. While we review an affirmative responsibility determination where it is shown that it may have been made in bad faith, see Bid Protest Regulations, 4 C.F.R. § 21.5(c) (1996); Tutor-Saliba Corp. et al., B-255756.2, Apr. 20, 1994, 94-1 CPD ¶ 268, we find no such showing here.

There is simply no evidence in the record--other than unsubstantiated speculation--to support Carter's allegations that McCombs has "teamed," or otherwise colluded in an improper contingent fee arrangement, with Red McCombs--or any other entity--to obtain contract award, or otherwise ensure successful performance of the Group 17 contract at its proposed price. As a preliminary matter, we note that enrollment in a manufacturer's bid assistance program was not a prerequisite or condition of the solicitation; rather, it is a benefit which offerors apply for and use, according to their individual needs and the manufacturer's terms. Apparently, Red McCombs is entitled to apply an $1800 invoice discount credit to every GMC vehicle price it proposes in upcoming competitions; without explanation, Carter contends that McCombs' offered lower prices resulted from the application of Red McCombs' $1800 vehicle discount. However, absent some corroborating evidence, such speculation does not constitute a basis for our Office to question the contracting officer's affirmative determination of McCombs' responsibility.

The record shows that on December 15, 1995, GSA's Credit and Finance Division completed a pre-award survey of the offeror's financial capability which verified that McCombs Fleet Services was the registered name of McCombs-Austin and further concluded that McCombs Austin was a responsible legal entity, capable of performing at the prices it had proposed. After receiving this information, the contracting officer decided not to further investigate Carter's allegations of impropriety since no concrete evidence was proffered to support the charges, and the contracting officer already had reliable, current information in her possession--the GSA financial survey--which demonstrated McCombs' responsibility. While Carter may disagree with the contracting officer's determination of responsibility, that disagreement does not suffice to show--or even suggest--that the contracting officer acted in bad faith. See Tutor-Saliba Corp. et al., B-255756.2, supra. Under these circumstances, we will not review the agency's affirmative responsibility determination, or otherwise consider Carter's speculative allegations of impropriety on the awardee's part.

Carter's alternative claim that McCombs' proposed price represents a "buy-in" is not a valid basis for protest. An offeror, for various reasons, in its business judgment, may decide to submit a below-cost offer, and such an offer is not inherently invalid. Little Susitna, Inc., B-244228, July 1, 1991, 91-2 CPD ¶ 6. Whether an awardee can perform the contract at the price offered is a matter of responsibility, which as discussed above, we will not review absent a showing of possible bad faith or that

definitive responsibility criteria have not been met, exceptions that do not apply here. Id.

The protest is denied.

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