

**DECISION**

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

40390

FILE: B-179835

DATE: January 29, 1974

MATTER OF: ACL-FILCO Corporation

**DIGEST:** Even though low bid in two-step procurement was substantially less than other bids, award to low bidder was proper since bidder verified bid was correct, agency determined that proposal would meet specifications at bid price, and "buying in" allegation would not constitute basis to preclude award to otherwise acceptable bidder.

Contracting officer not required by ASPR to withhold award after agency denies protest by offeror pending possible appeal of protest to GAO. However, where contracting officer is on notice that offeror has deferred filing protest with GAO pending agency action but exigencies of situation require immediate award, it is recommended that contracting officer obtain approval by higher authority for making award as in case of preaward protest filed directly with GAO. See ASPR 2-407.8(b)(2).

This protest involves the award of a contract to RCA Corporation (RCA) under invitation for bids (IFB) No. N00189-74-B-0021, a two-step procurement issued by the Naval Supply Center (NSC), Norfolk, Virginia. For the reasons stated below the protest is denied.

As background, on November 6, 1972, NSC received a requisition from the Supply Officer, Marine Corps Air Station, Cherry Point, North Carolina, for an automatic-manual test system for functional and performance testing of hydraulic pumps, motors and motor/pumps. The requisition indicated that the material was required by March 1973; that the requirement had a priority of "02" and that the total estimated cost was \$825,000. The contracting officer reports that two-step formal advertising was selected as the method of procurement because of the incompleteness of the specifications and the complexity of the system.

The procurement was synopsisized in the Commerce Business Daily and a request for technical proposals (RFTP), step one, was issued on January 17, 1973, with March 2, 1973, as the scheduled closing date for receipt of proposals. As a result of a preproposal conference certain changes were made to the specifications and, after several extensions, May 1, 1973, was established as the revised closing date for receipt of proposals.

Six technical proposals were received on May 1, 1973, all of which were categorized as reasonably susceptible of being made acceptable. However, certain ambiguities in the specifications were discovered and an amendment was issued correcting these errors and designating July 31, 1973, as the revised closing date for receipt of proposals.

All offerors responded with supplements to their technical proposals. Four of the revised proposals were categorized as acceptable and two of the proposals, including RCA's, were determined to be reasonably susceptible of being made acceptable by verification of minor points. On August 2, 1973, RCA was requested to verify that variable volume, pressure compensated pumps would be furnished as specified. By letter of August 3, 1973, RCA amended its proposal to provide that "All pumps will be variable volume, pressure compensated pumps."

Step two, the IFB, was issued on August 13, 1973, with September 12, 1973, as the scheduled bid opening date. Five bids were received as follows:

RCA Corporation	\$ 995,000.00
ACL-FILCO Corporation	1,745,151.50
Technology, Incorporated	1,746,910.00
Teledyne Sprague	1,991,950.00
Hamilton Standard	2,147,501.00

On September 13, 1973, an ACL-FILCO representative had a conversation with the contracting officer in which he stated that RCA's low price indicated that RCA had either made a mistake in bid or was "buying in". On September 14, 1973, ACL-FILCO sent a letter of protest to the contracting officer, in which it urged that RCA's bid price must reflect a gross error, or that RCA would provide a substandard product, or that RCA was "buying in", which should not be permitted. The letter concluded with the advice that ACL-FILCO had not filed a protest with our Office pending notification of the contracting officer's action on its protest.

On September 13, 1973, the contract negotiator verbally contacted RCA's representative to advise that the contracting officer suspected an error in RCA's bid because of the wide discrepancy between its bid and the next low bid. RCA was requested to verify that the specifications

were fully understood and that RCA intended to comply with the specifications. By letter of September 13, 1973, RCA verified that its bid price was correct; that it fully understood the Government's requirements; and that it would comply with the specifications. By letter of September 17, 1973, RCA further advised the contracting officer that in 1971, a similar system had been delivered to the Air Force; that RCA had been awarded contracts to "expand" that equipment as well as to deliver an "upgraded" duplicate system; and that RCA expected that a system would also be ordered by the Army. This letter stated that these systems were more complex than the system specified in this solicitation and that the experience thus gained by the RCA technical team in the hydraulic test automation field was directly applicable to this procurement.

An NSC representative contacted Kelly Air Force Base on September 14, 1973, and was advised that Kelly was in the process of executing a \$3.7 million contract with RCA for a full control system consisting of multiple test stands. On September 14, 1973, the contracting officer requested the Naval Air Rework Facility (NARF) to conduct another review of RCA's technical proposal. By letter of September 18, 1973, NARF advised the contracting officer that RCA's technical proposal would meet the requirements of the specifications; that there was no indication in RCA's proposal that it would provide less than a complete workable system and that RCA and its proposed subcontractors had more than adequate experience to develop and provide a suitable system. The September 18 letter also stated that the engineering estimate from the procuring activity, which was less than RCA's bid, was based on the best information available. We note that it was necessary to request additional funding since RCA's bid was more than the Government's estimate and authorization was received for an additional amount of \$170,000, to cover RCA's bid of \$995,000.

By letter of October 1, 1973, the contracting officer advised ACL-FILCO that RCA was entitled to the award since there was no evidence of "buying in" and RCA had confirmed that it would comply with the specifications at its bid price. Award was made to RCA on October 3, 1973. ACL-FILCO's telegram of protest of October 9, 1973, was received by our Office on the same date.

In its protest to our Office, ACL-FILCO has urged that the wide difference between RCA's price and the other bids indicates either a mistake in RCA's bid or that RCA is "buying in." ACL-FILCO has also questioned whether it and RCA were bidding on equivalent systems and whether RCA may have been given information that was not available to the other bidders. ACL-FILCO maintains that a disinterested party should evaluate RCA's proposal to determine if it fully meets the requirements of the specifications.

ACL-FILCO's contention that there may have been a mistake in RCA's bid does not constitute a basis for questioning the award since RCA has verified that its bid was correct.

Regarding ACL-FILCO's contention that RCA's bid may have been a "buy-in," Armed Services Procurement Regulation (ASPR) 1-311 does not preclude the acceptance of below cost bids, but merely cautions contracting officers to assure that losses are not recouped through change orders or "follow-on" contracts. We have held that so long as the bid of the suspected "buy-in" bidder is low and is responsive to the invitation requirements, and the bidder is determined to be responsible, award must be made to that bidder. See B-174451, February 28, 1972; B-174184, May 24, 1972, and cases cited therein. While ACL-FILCO has urged that the stage is set for a sole-source reprocurement and for the issuance of change orders, we have no information to indicate that the contracting officer will not follow the requirements of the regulation in administering RCA's contract.

Furthermore, RCA has advised that it was able to offer a low price in this procurement because of experience gained on other similar projects, and the contracting officer has confirmed that RCA was furnishing such systems. In this regard, ACL-FILCO's letter of November 30, 1973, concedes that the system specified in this procurement was similar to other RCA projects.

Concerning ACL-FILCO's contention that the RCA proposal may not meet specification requirements, the technical acceptability of this proposal was determined during the first step of this two-step procurement. The determination of whether a proposal is capable of meeting the specifications is primarily the function of the procuring activity, and will not be questioned by our Office unless it is shown that there was a clear abuse of discretion. We find no such indication here. See B-174184, May 24, 1972. Moreover, we have no evidence to support the contention that RCA may have received information that was not available to the other offerors.

Finally, ACL-FILCO has argued that since section 20.2 of our Interim Bid Protest Procedures and Standards (4CFR 20.2) provides 5 days within which to file a protest with our Office after notification of adverse agency action, the contracting officer was required to wait at least that period of time before making an award after the adverse decision, particularly since he was on notice that ACL-FILCO had deferred protesting to our Office pending the agency's decision. ACL-FILCO has also urged that the

contracting officer did not justify the urgency determination as required by ASPR 2-407.8(b)(3); that the contracting officer did not request an extension of bids under ASPR 2-407.8(b)(1); that the contracting officer did not obtain the views of our Office as provided in ASPR 2-407.8(b)(2); and that our Office was not advised in writing of the factors requiring the award as provided in section 20.4 of our Interim Bid Protest Procedures and Standards, supra.

There is no provision in ASPR which requires an agency to withhold an award in order to give a bidder the opportunity to file a protest with our Office. Consequently, ACL-FILCO's contentions would not constitute a basis for questioning the award. Nevertheless, in a case such as this, we think it would have been reasonable for the contracting officer to have obtained approval of higher authority before making award where time permitted.

In this connection, we note that the requisition from the requiring activity cited an urgency factor and the Navy has advised that the same urgency factor existed at the time of the award. Therefore, the record before us provides adequate justification for the contracting officer's determination to proceed with the award.



Deputy Comptroller General  
of the United States