

DECISION



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

FILE: B-186404

DATE: September 22, 1976

MATTER OF:

State Equipment Division of Secorp National Inc.

DIGEST:

1. In determining whether protester satisfies "interested party" requirement of GAO Bid Protest Procedures, consideration is given to nature of issues raised by protest and direct or indirect benefit or relief sought by protester. Accordingly, division of low bidder company whose bid was rejected, which would have corporate responsibility to perform if awarded contract, is "interested party" and may pursue formal protest.
2. Drafting of specifications to meet Government's minimum needs and determination whether items offered meet specifications are properly functions of procuring agency. Thus, since determination by procuring agency that two-drum vehicle does not meet intent of specifications to obtain, as stated in IFB, "four (4) wheel drive" vehicle is reasonable, it will not be disturbed by this Office.
3. Issue first raised by protester at conference before GAO will not be considered on its merits, since it was entirely independent of those raised and addressed prior to that time, and its basis was known by protester more than 10 working days before conference.

Invitation for bids (IFB) number 0260-AA-23-0-6-MW was issued on September 22, 1975, by the Government of the District of Columbia to solicit bids to furnish two sanitary landfill compactors (item 1) and two motor graders (item 2). Addendum No. 4 deleted the original specifications for the compactors and substituted a new specification, reading in part:

PUBLISHED DECISION

55 Comp. Gen.

B-186404

"Sanitary Landfill Compactor
Special Equipment and/or Service Requirement

Intent: This specification is to obtain
a four (4) wheel drive Sanitary
Landfill Compactor, with 300 net
horsepower (minimum). * * *

Paragraph 7(b) of the IFB Special Conditions provided in part:

"Failure of descriptive literature to show that the
product offered conforms to the specifications and
other requirements of this Invitation for Bids will
require rejection of the Bid. * * *

Bids were opened on February 13, 1976. The low bidder on
item 1 was Secorp National Inc. (Secorp). The second low bidder,
L. B. Smith Inc. of Va. (L. B. Smith), filed a protest with the
D. C. Department of General Services against any award to Secorp,
contending that the descriptive literature submitted with Secorp's
bid indicated that the vehicles Secorp proposed to furnish,
Hyster C451B compactors, failed to meet the solicitation's
specifications as follows:

"Bid Specification

Low Bidder-Hyster 451B

'Intent: a four (4) wheel
drive Sanitary Landfill
Compactor.'

Has only two (2) wheels
or drums.

'Engine: Diesel, 300 net
horsepower.'

Has two engines.

'4. Transmission: The
transmission shall be
powershift'

Has two transmissions.

'7. Axles: Planetary type
drive, both axles, with no
spin type differential on
rear axle (minimum).'

Has a bevel gear drive,
and no differential or
no spin.

'8. Steering: Steering angle
in each direction should be
a minimum of 40 degrees.
. . . .'

Has only 30 degrees of
angle in each direction."

B-186404

At the request of State Equipment Division of Secorp National Inc. (State Equipment), which would apparently have the prime corporate responsibility to perform if Secorp were awarded the contract, an informal meeting was held on April 5, 1976, with the D. C. Contract Review Committee (Committee). The Committee was established by part IV of Organization Order No. 9, Commissioner's Order No. 68-399, June 6, 1968, as amended, title I, D. C. Code (1973 ed.) to, in pertinent part:

"* * * review and make recommendations to Contracting Officers on the following:

* * * * *

"(2) Bids regardless of dollar amount where a Contracting Officer proposes to award a contract to a bidder other than the bidder submitting the lowest bid.

* * * * *

"(7) All protests received from bidders or prospective bidders."

By memorandum dated April 5, the Committee submitted its recommendation to the D. C. Director of General Services, stating that, in its opinion, "* * * the specifications as written provide no latitude of interpretation that a 2 drum compactor meets the requirement for a 4 wheel-drive compactor." Secorp was then advised by letter dated April 14 from the D. C. Director of General Services, received by Secorp on April 15, as follows:

"* * * the Contract Review Committee * * * has sustained the protest of L. B. Smith, Inc., of Virginia on the basis that the Hyster C451B, which you propose to furnish under the specifications in subject invitation, deviates materially from that which was specified, namely: 'four (4) wheel drive' vs. your offer of two (2) wheels or drums. Award therefore has been made to L. B. Smith."

By letter to this Office dated and filed April 27, State Equipment protested the rejection of its bid and the award to L. B. Smith. State Equipment states that:

"After preliminary conversations with the contracting and using agencies, State Equipment bid on the theory that the intention of the bid was to seek a vehicle in which all the wheels were motor-driven so the unit will not mire down or become stuck in rough terrain. Since both drums of the Hyster unit are motor-driven, maneuverability is no problem for this equipment. * * *"

State Equipment contends that:

"The prime consideration in specifying four wheel drive is not to limit the machine's configuration. 'Four wheel drive' is in effect a term of art that specifies that the machine must deliver power to all wheels, whether the configuration be 2, 3, or 4 or any other number of wheels."

State Equipment thus argues that the vehicles it would furnish meet the intent of the specifications. State Equipment further contends that in such case, any differences between the vehicles and the exact requirements of the specifications would have no effect on price, quantity or quality, and should, therefore, be waived by the contracting agency as minor deviations.

In addition to the above arguments raised by State Equipment in its April 27 letter of protest, State Equipment alleged for the first time at a conference before this Office on July 14, and subsequently in a letter filed on July 27, that regardless of whether its bid is found responsive, the vehicles offered by L. B. Smith failed to conform to the solicitation's specifications.

In response to State Equipment's protest, L. B. Smith, in addition to contesting the protester's responsiveness to the solicitation's specifications, submits the following arguments:

(1) since GAO's Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), concern procurement actions by "agencies of the Federal Government" (see section 20.1(a)), this Office has no jurisdiction to consider protests concerning actions by the Contract Review Committee, which was created by order of the Commissioner of the District of Columbia;

(2) State Equipment lacks the standing to protest, since it is not the bidder under the IFB but merely a division of the bidder Secorp, and since it is not " * * * an entity with legal capacity to

B-186404

contract or sue or be sued, except in the name of or for the corporation of which it is a division * * *";

(3) the protest should not be considered because the Committee's decision merely sustained L. B. Smith's protest and therefore does not constitute "adverse agency action," as defined in section 20.0(b) of our Procedures; and

(4) the protest, stated by State Equipment as being against the "decision of the Contract Review Committee," was not timely filed with this Office, since the Committee's "decision" was made on April 5, and since State Equipment should have known the substance of that "decision" on that date, the Committee allegedly having announced that it would act that afternoon.

Before considering the merits of State Equipment's protest, we will address the threshold issues raised by L. B. Smith.

In regard to our jurisdiction, we point out that bid protests against awards or proposed awards by the D. C. Government are considered under our Bid Protest Procedures. Since such protests need only concern "procurement actions" (see heading to our Procedures), and since State Equipment's bid has been rejected by the D. C. Department of General Services in the course of its procurement of equipment, GAO clearly has authority to consider the protest.

Concerning State Equipment's standing, section 20.1(a) of our Procedures provides that "An interested party may protest to the General Accounting Office * * *." In ABC Management Services, Inc., 55 Comp. Gen. 397 (1975), 75-2 CPD 245, we stated as follows:

"The requirement that a party be 'interested' serves to ensure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged procurement may be decided. We do not equate, however, the concept of 'standing to sue' as developed by the courts with the concept of 'interested party' as used in our Procedures. A protester may well be viewed as possessing a sufficient interest in the award selection in question even though the protester may not or does not choose to bid on the procurement. * * * Generally, in determining whether a protester satisfies the 'interested party' requirement, consideration should be given to the nature of the issues raised by the protest and the direct or indirect benefit or relief sought by the protester."

In view of those principles, State Equipment clearly qualifies as an "interested party" for purposes of pursuing the present protest with this Office.

In response to L. B. Smith's third argument, the phrase "adverse agency action" appears in section 20.2(a) of our Procedures, which concerns the time limit for filing a protest in this Office by a party that had initially protested to the contracting agency and received a response prejudicial to its position. Here, since the protest with the D. C. Department of General Services was filed by L. B. Smith, not State Equipment, the time limit in section 20.2(b)(2), rather than that in section 20.2(a), would apply.

Finally, concerning the timeliness of State Equipment's protest, section 20.2(b)(2) provides in part:

"* * * bid protests shall be filed not later than 10 [working] days after the basis for protest is known or should have been known, whichever is earlier."

Since we find no indication in the record, other than L. B. Smith's assertion, that State Equipment knew or should have known of the Committee's April 5 "recommendation," or its acceptance by the D. C. Department of General Services, before its receipt of the April 14 letter from the latter on April 15, its protest was filed in this Office in a timely manner.

In this connection, we note that in a letter to L. B. Smith dated March 5 from the Assistant Director for Material Management of the D. C. Department of General Services acknowledging the receipt of its protest, L. B. Smith was advised that "* * * After receipt of the [Contract Review] committee's recommendation, a detailed report will be supplied in response to your protest." Thus, only the contracting activity was to receive the Committee's recommendation, after which the parties would be advised of the agency's position; that statement is, therefore, consistent with the view that State Equipment had neither actual nor constructive knowledge of the disposition of L. B. Smith's protest until April 15. Accordingly, the protest, filed April 27, was filed within the required 10-day period.

B-186404

Proceeding to the merits of State Equipment's protest, the issues initially presented are essentially whether the vehicles which Secorp proposed to furnish, through State Equipment, met the stated intent of the IFB to "* * * obtain a four (4) wheel drive Sanitary Landfill Compactor * * *," and, if so, whether the offered compactors' deviations from the specifications are minor ones which may be waived. We have consistently held that the drafting of specifications to meet the Government's minimum needs and the determination whether items offered meet specifications are properly the functions of the procuring agency. 50 Comp. Gen. 193, 199 (1970). Where there may be a difference of technical opinion, we will accept the judgment of the procuring agency unless such judgment is clearly or unmistakably in error. 49 Comp. Gen. 195, 198 (1969).

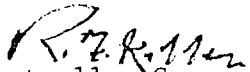
In its report responsive to the protest, the D. C. Government states that, in its view, the specifications "* * * clearly set forth the District of Columbia's intent to purchase four (4) wheel drive sanitary landfill compactors. * * *" As noted above, it was the Committee's opinion that a two-drum compactor did not meet the requirement for a four-wheel-drive compactor. In addition, the D. C. Government argues that the specifications could not be met by any type of axle other than a planetary drive type. In this connection, we have been advised that, generally, only four-wheel vehicles in which all wheels drive use the planetary drive method of gear reduction, and that the Hyster C451B, with only two drums, neither has nor requires such method.

Based on our review of the record, we believe that the D. C. Government has reasonably supported its determination that the Hyster C451B does not meet the stated intent of the specifications, and that the deviations from those specifications cannot be waived. In this regard, we note that paragraph 1 of the IFB's instructions to bidders specifically provided that bidders with questions relative to the interpretation of specifications should direct such questions, in writing, to the procurement office before bid opening; State Equipment elected to base its interpretation of the specifications on "preliminary conversations with the contracting and using agencies" rather than follow the designated procedure.

B-186404

Finally, the issue of whether the vehicles offered by L. B. Smith conform to the solicitation's specifications, first raised at the July 14 conference, is a matter entirely independent of those raised and addressed prior to that time. The basis for State Equipment's allegation was known to State Equipment at the latest upon its receipt of the D. C. Government's report, dated June 11 and received by State Equipment by June 23, the date of its comments thereon, since the report included a copy of L. B. Smith's bid. Accordingly, the issue was not timely raised and will not be considered on its merits in accordance with § 20.2(b)(2) of our Bid Protest Procedures. See Hammermills, Inc.; The Heil Co., B-179265, B-179642, April 10, 1974, 74-1 CPD 184.

In view of the above, the protest is denied. However, on the basis of the strong arguments presented by State Equipment that the equipment it offered would meet the needs of the D. C. Government, we have suggested to the D. C. Government that in future procurements of this type it consider expanding competition to include vehicles similar to the two-drum Hyster compactor, if in fact such equipment will meet its needs.


Acting Comptroller General
of the United States