DECISION

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

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FILE: B-184451, B-184394 DATE: June 1, 1976

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MATTER OF: Kepner Plastics Fabricators, Inc.
Harding Pollution Controls Corporation

DIGEST:

1. Questions concerning bidder's eligibility as "manufacturer" or "regular dealer" under Walsh Healey Act are for consideration by Department of Labor.

2. Certification of Independent Price Determination is not violated where employee with knowledge of confidential information concerning firm's product line, costing principles, and bidding strategy leaves firm's employ and may have assisted competitor in bid preparation unless collusion existed between bidders to set prices or restrict competition by inducing others not to bid.

3. Small business bidder's unqualified bid obligates that firm to provide a "regular commercial product" as required by solicitation. Award to that bidder must be preceded by determination that bidder will offer a "regular commercial product". If agency's needs can be met by other than a "regular commercial product", requirement was unduly restrictive and procurement should be readvertised without it.

4. Record does not reflect extent to which SBA considered "regular commercial product" requirement of solicitation in issuing COC to bidder, since only bidder's financial status was in question at time of COC referral. Issue of bidder's capability to comply with "regular commercial product" requirement was raised thereafter. GAO therefore recommends that procuring agencies should ask SBA to reconsider its issuance of COC if bidder's capability to meet solicitation requirement had not been examined previously.

Kepner Plastics Fabricators, Inc. has protested against the award of a contract to Max-Vac, Inc. under either invitation for bids No. N62578-75-B-0139 (IFB 0139) issued by the Naval Facilities Engineering Command (NAVFAC) or invitation for bids No. N00024-75-B-4602 (IFB 4602) issued by the Naval Sea Systems Command (NAVSEA). Harding Pollution Controls Corporation has protested against an award of a contract under IFB 0139 to either Max-Vac or Kepner.

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Both IFBs requested offers to supply the Navy with floating containment booms for use in enclosing and retaining oil and other contaminants. On June 11, 1975, when bids in response to IFB 0139 were opened, Max-Vac appeared to be the lowest bidder at $184,826.30 and Kepner the second lowest at $208,707.80. Of the bids opened on June 24, 1975, in response to IFB 4602 Max-Vac's again appeared to be the lowest at $84,600 and Kepner's the second lowest at $99,900. A preaward survey team recommended that no award be made to Max-Vac because that firm's financial resources were deemed inadequate. Since Max-Vac was a small business concern, the question of the firm's capacity and credit was referred to the Small Business Administration (SBA). The SBA subsequently issued a Certificate of Competency (COC) reflecting the determination that Max-Vac possessed adequate capacity and credit to perform.

Kepner's protest regarding IFB 0139 was filed with this Office on July 3, 1975, and instead of referencing IFB No. N6278-75-B-0139 the protest erroneously referenced IFB No. N62578-75-B-0126. Kepner protested against an award to Max-Vac under both IFB 0139 and IFB 4602 because Kepner's former sales and marketing manager, who left Kepner's employ on May 30, 1975, appeared to have assisted Max-Vac in formulating its bids. This, Kepner contends, is in violation of the Independent Price Determination clauses contained in both solicitations because this former employee allegedly was in possession of confidential information about Kepner's product line, costing principles and bidding techniques. Kepner has acknowledged, however, that this former employee did not know the actual prices which Kepner bid on these two protested procurements. Also, Kepner contends that the Government acted improperly in considering Max-Vac's bids because Kepner believes that the information concerning Max-Vac's use of the former Kepner employee in formulating its bids impugns Max-Vac's integrity; the fact that Max-Vac has never produced the items involved in the procurement should render Max-Vac's bids nonresponsive to the solicitations' requirement that the contractor supply regular commercial products; that Max-Vac is nonresponsible for lack of experience; and that Max-Vac is ineligible for award under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-41 (1970).

Harding's protest against an award under IFB 0139 to either Kepner or Max-Vac was also based on information received by Harding which indicated that the former Kepner employee had assisted Max-Vac in the preparation of its bid.

In response, Max-Vac contends that Kepner has not filed a timely protest in regard to IFB 0139 because Kepner's letter filed in this Office of July 3, 1975, referred to a solicitation under which Max-Vac did not submit a bid. Although Kepner's letter incorrectly referred to IFB 0126, due to the detail of the rest of the protest there appears to have been no confusion on the part of the Navy or any of the interested parties as to which solicitation Kepner meant. Also, in regard to the timeliness of its protest concerning IFB 0139 Kepner has submitted an uncontested statement that its first indication that its former employee might be assisting Max-Vac in the preparation of its bids came in an anonymous telephone call on June 19, 1975. In the circumstances, we will consider Kepner's protest in regard to IFB 0139 on its merits.

Concerning Kepner's contention that Max-Vac is not a "manufacturer" or "regular dealer" as required by the Walsh-Healey Act, the responsibility for determining whether a bidder is so qualified rests in the first instance with the contracting agency and is subject to review by the Secretary of Labor and not by the General Accounting Office. Leasco Information Products, Inc., 53 Comp. Gen. 932 (1974), 74-1 CPD 314.

The "Certificate of Independent Price Determination" contained in IFB 4602 provides in part that:

> "(a) By submission of this offer, the offeror certifies, and in the case of a joint offer, each party thereto certifies as to its own organization, that in connection with this procurement:
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> > "(1) The prices in this offer have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition as to any matter relating to such prices with any other offeror or with any competitor:
> >
> > "(2) Unless otherwise required by law, the prices which have been quoted in this offer have not been knowingly disclosed by the offeror and will not knowingly be dis-

closed by the offeror prior to opening in the case of an advertised procurement or prior to award in the case of a negotiated procurement directly or indirectly to any other offeror or to any competitor; and

"(3) No attempt has been made or will be made by the offeror to induce any other person or firm to submit or not to submit an offer for the purpose of restricting competition."

As we have previously held in a decision arising from very similar circumstances, the purpose of this certification is to assure that the bidders did not collude among themselves to set prices or to restrict competition by inducing others not to submit bids and the transfer of an employee from one bidder to another will not constitute a violation of the certification absent collusion between bidders or an indication that a firm was prevented from bidding. B-179066, August 30, 1973.

However, Harding argues that an award could not be made to Max-Vac or Kepner without "cloud of suspicion and mistrust" comparable to that mentioned in our decision at 49 Comp. Gen. 251 (1969), and therefore IFB 0139 should be canceled and bids resolicited. In the case cited the record contained evidence that a Government employee had furnished one bidder confidential information concerning another bidder. Since this disclosure was prejudicial to the second bidder's interest, and since suspicion of favoritism had been created by the dismissal of the Government employee, we held that the solicitation should be canceled. That case is distinguishable as there was evidence of an actual violation of the agency's regulations and there was the appearance of favoritism on the part of the Government. Accordingly, as there is no evidence that either Max-Vac or Kepner violated the Certificate of Independent Price Determination, Harding's protest is denied.

Both solicitations require the contractor to supply a "regular commercial product", which term is undefined. The specifications in IFB 0139 provide in part:

"3. REQUIREMENTS

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"3.3 Standard product. Except where modified herein, it is intended that the equipment and its component parts shall be a regular commercial product of the manufacturer or his suppliers. All parts, components, and assemblies shall be new, unused, and free from defects, and imperfections which might affect the serviceability and appearance of the finished products."

IFB 4602 contains a virtually identical provision. Bidders were not required to make any entries in their bids concerning this requirement.

The two procuring Commands have reacted differently to Kepner's allegation that Max-Vac is ineligible for award because that firm's "regular commercial products" do not include oil containment booms. NAVFAC states:

> "[t]he oil booms to be produced under [its] invitation are essential in that they will be used to contain oil spills occurring in rivers, lakes, harbors, and even the open ocean. Failures in the booms could result in spilled oil not being contained, with widespread diversion of the spillage and consequent substantial damage to the environment and wildlife.
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> Completely separate and apart from the question of whether or not any firm is responsible, NAVFAC has determined that it is so essential that any oil booms purchased operate satisfactorily, that it cannot be the guinea pig for a hitherto untested product. NAVFAC would take this position even in a case where the low bidder has unquestionable capacity and financial resources to accomplish the manufacture.

Conversely, NAVSEA states that the "regular commercial product" clause:

> "* * * was included in the specification to assist in assuring that only a capable, qualified manufacturer would be selected. As such the question of whether the product offered is a regular commercial one relates to the responsibility of the bidder rather than to responsiveness. B-177197, April 4, 1973. Since Max-Vac has been determined to be a responsible bidder, paragraph 3.5 should pose no bar to an award of contract."

In support of its position NAVSEA cites our decision Dunham-Bush, Inc., B-184537, January 14, 1976, 76-1 CPD 25, in which we held that a solicitation clause that required the equipment being procured to have had "extensive commercial and industrial application as manufactured by the bidder" was directed to the experience of the bidder in manufacturing the equipment rather than to the performance history of the equipment. Therefore, this Office concluded that the requirement related to the bidder's responsibility.

The divergent views of these two procuring agencies is illustrative of the difficulty which sometimes arises in determining whether a solicitation requirement relates to "responsibility" or "responsiveness." We think such a requirement goes to responsiveness if it describes some quantifiable characteristic of the product itself. On the other hand, solicitation requirements concerned with the experience of the bidder relate to responsibility. In this connection, we have recently held that definitive standards of responsibility (such as "the bidder shall have had approximately 5 years successful experience in repairing and servicing the specified equipment") must be met as a prerequisite to an affirmative determination of responsibility. The waiver of such a requirement may prejudice other bidders or potential bidders who did or did not bid in reliance upon its application. Haughton Elevator Division, Reliance Electric Company, B-184865, May 3, 1976, 76-1 CPD ___.

Whether the "standard product" clause is viewed as a legal obligation which could be enforced against Max-Vac upon the acceptance of its bid (responsiveness) or is a prerequisite to an affirmative determination of responsibility, it is clear that Max-Vac's unqualified bid obligates that firm to provide a "regular commercial product". In this connection, we do not agree with NAVSEA's suggestion that award to Max-Vac would be proper even if it could not furnish a commercial product. A willingness to proceed with awards under

these solicitations even if a bidder cannot supply a "regular commercial product" would indicate that the "standard product" clause was unnecessary. Under these circumstances, cancellation of the solicitation and readvertisement without the clause would be in order.

In fact, the SBA has issued a COC which reflects a determination by that agency that Max-Vac has the "capacity" to manufacture these oil containment booms. It is not clear from the record, however, to what extent SBA considered the "standard product" clause in making its determination. The referral to SBA for a COC was prompted by doubts as to Max-Vac's financial condition, and it does not appear that the firm's ability to comply with the "standard product" clause was in issue at that time. It was not until Kepner filed its protest before our Office that this issue was developed.

If the record shows that the SBA considered the "standard product" clause before issuing a COC to Max-Vac, we believe Max-Vac would be eligible for award under these solicitations. On the other hand, if the SBA did not consider this issue because Max-Vac's financial status was paramount at the time of the referral, the procuring commands should ask the SBA to reconsider the issuance of the COC in light of the "standard product" clause. We are requesting the procuring commands to advise of the actions taken in this regard.

Deputy Comptroller General
of the United States