

DECISION



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

FILE: B-190081

DATE: May 9, 1978

MATTER OF: Clifton Precision Division of Litton
Systems, Inc.

DIGEST:

1. Protest which questions bidder's responsibility is not for review by GAO in absence of definitive responsibility criteria in solicitation or evidence of fraud on part of procuring officials.
2. Bidder's failure to furnish affidavit regarding affiliates does not constitute material deviation from IFB and may be waived as minor irregularity pursuant to ASPR § 2-405(v).
3. Possibility of buy-in provides no basis upon which award of contract may be challenged. Rejection of bid for too low price requires determination of nonresponsibility, which is not the case here.
4. Alleged violation of antitrust laws is matter for determination by Department of Justice.

Clifton Precision Division of Litton Systems, Inc. (Clifton), protests the award of a contract to Astronautics Corporation of America (ACA) under invitation for bids (IFB) No. F33657-77-B-0501, issued by the Aeronautical Systems Division, Wright-Patterson Air Force Base, Ohio. The subject IFB, issued June 24, 1977, called for the manufacture and delivery of 305 AQU-13A/A horizontal situation indicators (HSI) for use in both the F-5 and F-16 aircraft.

Bids were opened July 26, 1977, and, of the two bids submitted, ACA was the low bid er, with a price

B-190081

of \$2,188 per unit, and Clifton's second low bid was \$2,727 per unit. Both bids were determined to be responsive and a preaward survey was conducted on ACA. On August 31, 1977, the Defense Contract Administration Services (DCASD), Milwaukee, Wisconsin, issued a preaward survey report recommending award to ACA. Thereafter, the contracting officer determined ACA to be the low, responsive and responsible bidder. The contracting officer states that prior to Clifton's entry into competition for the type AQU-13 series HSI's, ACA was in a sole-source position as a supplier. It is reported that unit prices paid ACA during this sole-source period ranged from \$3,412 to \$3,694.

Clifton contends that ACA, the low bidder, submitted a nonresponsive bid at an unreasonably low price and that ACA is a nonresponsible firm. Clifton also contends that its firm is being unfairly and illegally denied the opportunity to compete on the Air Force contracts for the AQU-13A/A by reason of ACA's allegedly unlawful and anticompetitive practices.

Clifton contends that ACA is nonresponsible because it is unable to comply with the required delivery schedule, cannot furnish an engineering qualified product, lacks financial capacity, and lacks integrity. As noted above, the preaward survey of ACA was affirmative and recommended award. Based on this recommendation and his personal knowledge, the contracting officer determined ACA responsible. Our Office no longer reviews protests against affirmative determinations of responsibility unless either fraud is shown on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been met. See Consolidated Elevator Company, B-190929, March 3, 1978, 78-1 CPD 166. The solicitation contained no definitive responsibility criteria. While the contracting officer's good faith was questioned, we find no evidence of a lack of good faith in making his determination. Therefore, our Office will not review the contracting officer's determination that ACA is a responsible firm.

B-190081

Clifton states that ACA's bid is nonresponsive because the firm does not intend to utilize Clifton's manufactured components as required by the specification. The contracting officer states that he has looked into this allegation and is satisfied that Clifton's components will be utilized. ACA did not take any exception to the specifications and therefore is bound to comply with all the contract provisions, including use of the Clifton components, and it is the responsibility of the procuring agency to enforce the contract as awarded.

Clifton also contends that ACA's bid is non-responsive for failing to submit with its bid an affidavit stating whether ACA has any affiliated bidders. The contracting officer states that he waived as a minor informality ACA's failure to submit the affidavit called for in section "B," paragraph 9, of the IFB entitled "Affiliated Bidders." Our Office has stated that failure to provide an affidavit regarding affiliates may be waived as a minor irregularity. See ASPR § 2-405(v) (1976 ed.); and Kleen-Rite Janitorial Services, Inc., B-179652, January 18, 1974, 74-1 CPD 15.

Clifton argues that ACA's bid should be rejected as nonresponsive because the price bid is unreasonable, citing ASPR § 2-404.2(c) (1976 ed.), and below cost in an attempt to "buy-in" with the purpose of forcing Clifton out of the market. The regulation cited relates to rejection of an "unreasonably" high bid. In regard to the "buy-in" allegation, our Office has stated that the possibility of a buy-in or the submission of a below-cost bid is not a proper basis upon which to challenge the validity of a contract award. Inter-Con Security Systems, Inc., B-189165, June 15, 1977, 77-1 CPD 434. Proper rejection of a bid as extremely low requires a determination that the bidder is non-responsive, which, of course, is not the case here. See Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD 169.

Clifton also alleges that ACA is engaging in anticompetitive procedures, including a false certification of the Independent Price Determination clause

B-190081

in its bid, in an attempt to monopolize the market in restraint of trade. In support of its position, Clifton has submitted affidavits which refer to oral representations allegedly made by officials of ACA concerning the ways in which they would eliminate Clifton from the market.

The Air Force takes the position that its referral to the Justice Department of ACA's bid in accordance with ASPR § 1-111 (1976 ed.) was not warranted based on the information available. The contracting officer states that his review of ACA's bid revealed no evidence of suspected criminal conduct, noncompetitive practices, kickbacks, other procurement irregularities or indications that ACA's certification of Independent Price Determination was false. The Air Force also states that it informed Clifton at a December 7, 1977, meeting that even if it believed that sufficient evidence existed to warrant referral to the Justice Department, such action would not be necessary because Clifton had already lodged an antitrust complaint with the Justice Department.

Clifton's contention that ACA is restraining competition concerns the application of criminal law and is properly for consideration by the Department of Justice and not our Office. Automated Datatron, Inc. Microfilm Communications Systems, Inc., B-184022, September 16, 1975, 75-2 CPD 153; Martin & Turner Supply Company, 54 Comp. Gen. 395 (1974), 74-2 CPD 267. As noted above, Clifton has forwarded to the Department of Justice copies of the files of this case for its consideration and determination.

For the reasons stated, the protest is denied.


Deputy Comptroller General
of the United States