

7244
DECISION



J. N. O'Connell
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-197313

DATE: August 7, 1978

MATTER OF:

RKFM Products Corporation

DIGEST:

1. Objection to affirmative determination of successful offeror's responsibility is not considered by GAO where neither fraud nor noncompliance with definitive criteria is alleged.
2. Allegation that successful offeror is "buying in" and deliberately taking contract at a loss provides no legal basis to challenge validity of award.
3. Protester's objection to agency determination that its proposal was technically unacceptable need not be considered where record demonstrates that, on basis of established price evaluation criteria, protester's offered price was substantially higher than successful offeror's, with consequence that protester would not have received award even if its offer had been considered technically acceptable.

RKFM Products Corporation (RKFM) protests the award of a contract by the U.S. Army Armament Materiel Readiness Command (ARRCOM) to Polaron Products of Pennsylvania, Inc. (Polaron) under request for proposals (RFP) No. DAAA09-77-R-0062. RKFM contends that the rejection of its allegedly lower-priced proposal was improper and not in the best interest of the Government, and expresses doubt whether Polaron has the capability to perform the contract at its offered price.

The RFP contemplated the award, on or before October 30, 1977, of a firm-fixed price contract, with provision for Economic Price Adjustment, to establish a base for production of M42/M46 Grenade Part Body Assemblies, for the 155mm, M483 and 8" M509 Projectile,

within 21 months after award, with delivery of first articles and a prove-out production quantity required six months thereafter. Offerors were requested to propose prices on increments of 500,000 assembly capacity per month, to total capacity of 3 million per month, with the Government reserving the right to make one or more awards. The RFP specified that award(s) would be made on the basis of the lowest overall cost to the Government, considering the cost of the facility and the grenades.

Offerors were required to submit technical proposals "sufficiently detailed and complete so as to demonstrate that this offeror has a thorough understanding of the requirements and the Scope of Work." The RFP instructed that proposals would first be evaluated from a technical standpoint without regard to proposed costs. Those proposals which were considered to be technically acceptable or susceptible to clarification by further negotiation would then be evaluated on the basis of offered prices for various specified contract line items, and would be further evaluated on the bases of other specified factors relating primarily to an offeror's capacity (in terms of equipment, facilities, manpower and financial strength) to perform the contemplated effort.

By August 29, 1977, the closing date for receipt of proposals, twelve proposals had been received. Two offerors withdrew their proposals and one was declared ineligible because it proposed use of GOCO (government-owned, contractor-operator) facilities which was not permitted by the solicitation. After conducting an initial technical evaluation of the nine remaining proposals, ARRCOM, by TLX message dated September 7, 1977, requested all nine offerors to clarify their proposals.

The message to RKFM pointed out numerous deficiencies, including the failure to provide information specifically called for by the RFP. The message further advised of the opportunity for discussions; that negotiations would be closed on September 21, 1977; and that best and final offers, including any revisions to the initial offer, must be submitted by that date. The deficiencies ascertained in RKFM's initial proposal were also discussed during a conference call between ARRCOM and RKFM personnel, in

which RKFM indicated it would correct each area in its best and final offer.

RKFM submitted a timely best and final offer which was technically evaluated during September 22-23, 1977, and determined to be materially deficient because it still contained a number of deficiencies and omissions discerned in the initial proposal. These deficiencies included the failure to provide average time between failures, average repair time, an inadequate process inspection plan indicating a lack of understanding on the part of RKFM, and inadequate data as to required labor and milestones. ARRCOM's technical personnel concluded that RKFM lacked understanding of the Technical Data Package in the RFP, and its best and final offer was rejected as technically unacceptable.

As a result of that technical evaluation, RKFM's proposal was not further considered in the ensuing price evaluation, which was limited to those remaining proposals found to be technically acceptable. ARRCOM ultimately determined that a single award to Poloron for the full three million per month capacity represented the lowest total offer to the Government, and award was made to that firm on September 30, 1977.

RKFM contends that Poloron's price for a line having the capacity to produce 3,000,000 grenades monthly is inordinately low and would be more commensurate with contractor facilities and equipment to produce only 1,500,000 grenades monthly. In short, RKFM doubts Poloron's capacity, absent Government furnished equipment, to produce 3,000,000 per month. In the alternative, RKFM submits that Poloron is "buying in" on this contract, i.e.-taking a "loss contract" in order to obtain more profitable follow-on orders for the grenades.

Whether a prospective contractor has the necessary production equipment and facilities, as well as the organization and technical skills to perform a particular contract is a matter of the prospective contractor's responsibility. See Armed Services Procurement Regulation (ASPR) 1-903 (1976 ed.). Before a prospective contractor may be determined responsible, and therefore eligible for

award, a pre-award survey must be made when the information available to the purchasing office is not sufficient to enable the contracting officer to make a responsibility determination. ASPR 1-905.4(b).

The record in this case shows that a pre-award survey was performed on Poloron, with an ensuing determination that Poloron was a "responsible" prospective contractor. As a general rule, we do not consider protests concerning a determination that a prospective contractor is responsible. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Affirmative determinations of responsibility are largely a matter of subjective judgment within the sound discretion of contracting agency officials, who must bear the brunt of any difficulties experienced by reason of a contractor's inability to perform. 39 Comp. Gen. 705 (1960). We will review such determinations only in certain limited circumstances--if there is a showing of fraud by the agency, or if it is alleged that definitive responsibility criteria such as a requirement that a contractor possess a particular certification set forth in the solicitation were not properly applied by the agency. See Data Test Corp., 54 Comp. Gen. 499 (1974), 74-2 CPD 365. Since the affirmative determination of Poloron's responsibility is not challenged on the basis of fraud or alleged misapplication of definitive responsibility criteria, RKFM's objection to such determination will not be considered. See Century Brass Products, Inc., B-190313, April 17, 1978, 78-1 CPD 291, involving another challenge to the award to Poloron.

With regard to RKFM's allegation that Poloron is deliberately taking the contract at a loss by "buying in," it is well established that the possibility of a buy-in or the submission of a below-cost bid provides no legal basis upon which the validity of an award may be challenged. See A.C. Electronics, Inc., B-185553, May 3, 1976, 76-1 CPD 295; Inter-Con Security Systems, Inc., B-189165, June 15, 1977, 77-1 CPD 434; Consolidated Elevator Company, B-190929, March 3, 1978, 78-1 CPD 166.

RKFM's major objection is to the determination that its proposal was technically unacceptable. We see no need to consider the propriety of that determination, since the record demonstrates that even if RKFM's proposal had been deemed technically acceptable, it would have been ineligible for award since its best and final offer price was substantially higher than Poloron's, and the RFP required that award be made to that technically acceptable offeror presenting the lowest overall cost to the Government.

RKFM's best and final offer was not initially evaluated from the standpoint of price due to its technical unacceptability. However, in view of RKFM's protest allegation that it was the lowest-priced offeror, its price was evaluated after award of the contract as part of ARRCOM's response to the protest. Under the price evaluation criteria set out in the RFP, ARRCOM provides the following comparison of best and final offers:

	<u>Poloron</u>	<u>RKFM</u>
FACILITIES	\$9,196,280.00	\$15,550,472.00
PROVE OUT	450,000.00	270,000.00
FIRST ARTICLE M42	1,000.00	NB
FIRST ARTICLE M46	1,000.00	NB
1,890,000 M42 GRENADES	1,474,200.00	1,231,410.60
1,110,000 M46 GRENADES	856,920.00	701,009.40
SUBTOTAL	\$11,979,400.00	\$17,752,892.00
DATA	----	50,000.00
DISCOUNT	(11,979.40)	(89,014.46)
TRANSPORTATION EVALUATION	38,757.00	40,533.00
BEST EVALUATED PRICE	\$12,006,177.60	\$17,754,410.54

RKFM does not take exception to the accuracy of these figures. It contends, however, that the evaluation is faulty because it is not based on ARRCOM's actual requirements for grenade production.

The essence of RKFM's argument is that it submitted a lower unit price per grenade, and that if ARRCOM's total requirements are taken into account, it is the lowest evaluated offeror. RKFM asserts in this regard that the RFP clearly indicated ARRCOM's need for a sustained grenade production of 3 million per month over five years, and that a cost evaluation on that basis, rather than on the basis of only 3 million grenades, would be the proper approach. Specifically, RKFM points to the Executive Summary of the RFP, which advised offerors that a substantiated unit cost for a "sustained production" of the M42/M46 grenades must be included in proposals, and which contained the following statement:

"There are planned requirements for the M42/M46 grenades in the five year program, adequate to reasonably believe that supply contracts will be forthcoming to utilize all or a portion thereof of the capacity established by this proposal. However, if requirements (and funds) are not available at that time, the lines will be placed in layaway as provided for in other provisions of this solicitation."

RKFM contends that it was obviously the intent of ARRCOM to purchase grenades on a sustained production basis and therefore the only proper basis for evaluating price proposals would be the long-term sustained production of 3 million grenades per month over a five year period.

Evaluation of proposals, however, must be consistent with the evaluation scheme set forth in the RFP. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325; EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338; Francis & Jackson, Associates, 57 Comp. Gen. 244 (1978), 78-1 CPD 79. The evaluation scheme set forth in this RFP advised that the award would be made on the lowest overall cost to the Government based upon the following price factors:

- (1) Total price for establishing the production capability of 500,000/ 1 million, 1.5 million, 2 million, 2.5 million or 3 million grenades per month. (Item AA)
- (2) Total price for prove out quantity (Clins 0001AD, 0002AD, 0003AD, 0004AD, 0005AD and/or 0006AD.)
- (3) Total price for producing the production grenades (Items AB & AC).
- (4) First Article Cost (Item 0007, 0008).
- (5) Data and reports Cost (Item 0009).
- (6) Discounts offered
- (7) Transportation costs
- (8) Abnormal maintenance costs

The production quantities called for by schedule items AB and AC were clearly limited to one month's production (even though prices were solicited on the basis of a monthly production rate and not solely a one-time production quantity). Accordingly, ARRCOM could not properly evaluate proposals on the basis suggested by RKFM.

We point out in this regard that while the RFP indicated the likelihood of future grenade purchases over a five-year period, it also apprised offerors that funds were not available for any production quantities, that follow-on production quantities would be ordered only if funds became available, but that the evaluation would include the production quantities option of items AB and AC. We think these provisions clearly placed offerors on notice of the evaluation scheme. If RKFM did not agree with that evaluation approach, it should have protested prior to the closing date for receipt of proposals. 4 C.F.R. 20.2(b)(1) (1977).

B-190313

The protest is denied.


Deputy Comptroller General
of the United States