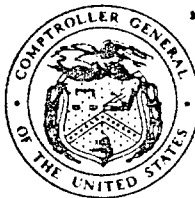


DECISION



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

FILE: B-194554

DATE: September 4, 1979

MATTER OF: A&M Instrument, Inc. DL600174

[Protest of Army Contract Award]

DIGEST:

1. GAO will review protests concerning procurements conducted under small purchase procedures where protester alleges awardee was not approved source. Tagg Associates, B-191677, July 27, 1978, 78-2 CPD 76, distinguished.
2. Army's use of contractor's drawing, which included names of sources approved by contractor, does not impose duty on Army to only solicit those sources. However, suggestion is made that drawing should be revised to make is clear that competition is not limited to contractor's approved sources.
3. Protest asserting that Army should restrict competition is inappropriate for review under GAO bid protest function, since it conflicts with objective of that function, specifically, to insure attainment of full and free competition.
4. Objection to agency's affirmative determination of another bidder's ability to meet specifications is not reviewed by GAO, except in limited circumstances not present.
5. Determination concerning which provision(s) should be included in solicitation to assure that items being procured will meet Government's needs is primarily within province of judgment of contracting agency. GAO will not object to such determination except where it unduly restricts competition or is otherwise in violation of law or regulations.

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Request for quotations (RFQ) No. C1902831 to supply 200 panel-type ammeters, NSN: 6625-00-875-9875, was issued on January 24, 1979, by the United States Army Communications and Electronics Materiel Readiness Command, Department of the Army (Army). Quotations were to be returned by February 24, 1979. The ammeter to be supplied was required to comply with Army Ordnance drawing No. 10105472, which included, among other specifications, meter resistance: 1175 ohms \pm 20 percent. DLG 02664

There were eight companies from which the Army requested quotations. The Army advises that these firms were chosen from qualified products list (QPL) No. 10304-46, covering a range of meters, which included the instant ammeter, rather than an individual item. However, the Army states: "This was not a QPL procurement as such, rather, [we] used the list to obtain the names of potential suppliers of the ammeter."

On February 27, 1979, the Army made the decision to award contract DAAB07-79-M-J408, to Phaostron Instrument and Electronics Company (Phaostron). It was not awarded until March 15, 1979, since A&M protested to the agency against the proposed award on March 12, 1979. Subsequently, A&M protested the award of the contract to our Office. DLG 02665

A&M contends that the Army's drawing, which includes the name of Raytheon Company (Raytheon), is a source control type. A&M believes that the inclusion of Raytheon in the drawing indicates that "Raytheon as the prime most certainly has the responsibility of testing and approving its sources of supply." Consequently, it is A&M's position that the award is unfair, since it and Weston Electrical Instruments Corporation (Weston) are the only two companies approved by Raytheon as sources for this ammeter. Moreover, A&M alleges that "the fact that [Phaostron has] previously furnished this item does not automatically give them approval." In addition, A&M argues that because Phaostron's standard ammeter, which is listed on the QPL, would have to undergo a major component change in order for it to meet the 1175 ohms \pm 20 percent drawing requirement, the Army should not consider that ammeter unless it is retested. Further, A&M CNG 01001 DLG 02666

questions the usefulness of having a Government Source Inspection at Phaostron's plant arguing that it will not prove to be a conclusive indication that Phaostron's ammeter conforms to all of the specifications.

The Army points out that this procurement was conducted under the small purchase procedure, Defense Acquisition Regulation (DAR) § 3-600, et seq. (1976 ed., DAC 76-17, Sept. 1, 1978), since the amount of the contract is \$3,600. The agency believes the protest should be dismissed, citing Tagg Associates, B-191677, July 27, 1978, 78-2 CPD 76, where we stated:

"We conclude that the small purchase procedure gives the contracting officer broad discretion to determine how the needs of the Government can be best met. Because it permits purchases to be made without the need to maximize competition with specifications adapted to that purpose, no useful purpose would be served by our consideration of protests concerning alleged specification improprieties in small purchase procurements. Generally we believe our review of these types of procurements should be limited to cases of fraud or intentional misconduct, or instances where it appears that the procuring activity has not made a reasonable effort to secure price quotations and related information from a representative number of responsible firms as anticipated by [DAR] § 3-600 et seq."

Alternatively, the Army argues that A&M's contention that only A&M and Weston are approved sources is irrelevant since their "approval" comes from Raytheon not the Army. The Army points out that this is a Government procurement concerned with which of the prospective firms can meet the Government's requirements and "Raytheon does not dictate from whom the Government may buy, in this instance." Furthermore, the Army contends that since each of the eight firms solicited had at least one meter within the QPL range, each was considered qualified for the entire range and capable of supplying the ammeter. Also, the Army

argues that the use of the drawing did not limit the capable sources of supply to only those listed on the drawing. Finally, the Army advises that Phaostron has agreed to perform inspections and tests, even though not required to do so due to costs considerations, to substantiate that the ammeter conforms to the drawing specifications.

With respect to the Army's position that A&M's protest should be dismissed based on Tagg Associates, supra, we disagree. Tagg stands for the proposition that our review of protests concerning specification improprieties in a solicitation issued under the small purchase procedures is limited to cases of fraud, intentional misconduct, or instances where it appears that the procuring activity has not made a reasonable effort to secure price quotations and related information from a reasonable number of responsible firms. As this is not the situation in this instance, because the protester alleges the awardee was not an approved source, we will review this procurement.

In the present case, A&M, by contending that only A&M and Weston are the approved sources, essentially is asserting that Phaostron is not responsive to the solicitation. We do not agree. The drawing was not a source control type, since it did not require that a bidder be an approved source in order to bid. It is clear that the drawing was submitted by Raytheon pursuant to a prior procurement and the Army's subsequent use demonstrates that the Army has accepted responsibility for the drawing. Therefore, this use did not impose any duty on the Army to solicit only those companies which possessed an approved source rating from Raytheon. Phaostron submitted its quotation, without taking exception, for the ammeter as specified in the drawing and is responsive to the solicitation. See 52 Comp. Gen. 546 (1973). However, we can see how the drawing could create confusion and could have been interpreted by potential offerors as restricting consideration of quotations to previously approved sources. Accordingly, in an effort to preclude a recurrence of similar difficulties in future procurements, we are suggesting to the Secretary of the Army, by separate letter, that the drawing be revised to make clear that competition is not limited to prior approved sources.

To the extent that A&M is asserting that the Army should have restricted the competition to only approved sources, A&M and Weston, and not requested quotations from six additional companies, we will not consider such assertion. This contention conflicts with the objective of our bid protest function which is to insure attainment of full and free competition. Therefore, it would be inappropriate for our Office to resolve this issue pursuant to our bid protest function, absent evidence of fraud or willful misconduct by the procuring activity. See Miltope Corporation--Reconsideration, B-188342, June 9, 1977, 77-1 CPD 417, affirmed in Miltope Corporation--Reconsideration (Second), B-188342, July 1, 1977, 77-2 CPD 3.

A portion of A&M's protest challenges the ability of Phaostron to provide the specified ammeter and, therefore, questions the contracting officer's affirmative determination of the awardee's responsibility. It is the policy of this Office not to review protests which question these determinations unless either fraud on the part of the procuring officials is alleged or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Mayfair Construction Company, 58 Comp. Gen. 105 (1978), 78-2 CPD 372. Neither exception is applicable here.

A&M has asserted that the Government source inspection is inadequate and does not provide all the necessary protections to the Government. The Army had determined that it was too expensive for the Government to inspect, in light of the dollar amount of the procurement and, therefore, the onus of inspection was shifted pursuant to DAR § 7-103.24 (1976 ed.) to Phaostron. The determination concerning which provision(s) should be included in a solicitation to assure that items being procured will meet the Government's needs is primarily within the province of the judgment of the contracting agency. See Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. As noted above, the Army shifted the risk of inspection to Phaostron which it apparently believed would still provide sufficient safeguards for obtaining the required item. We will not object to such determination except where it unduly restricts competition or is otherwise in violation of law or regulations. Neither is applicable here. In any event, the record indicates that Phaostron

has supplied this ammeter to the Government on three prior occasions and the ammeter "has been satisfactory in every respect."

Accordingly, the protest is denied.

R. F. K. 11/1/41
Deputy Comptroller General
of the United States