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DECISION

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

FILE: B-194838

DATE: February 6, 1980

MATTER OF: Security Assistance Forces & Equipment
International Inc.

DIGEST:

DLG 1388

1. GAO finds protest to be timely filed on May 14, 1979. Protester was supplying information in its April 16, 1979, letter to contracting officer which it believed was sufficient to correct its proposal deficiencies. Protester made good-faith effort to correct these deficiencies. Consequently, GAO concludes that protester should not have known until the contracting officer rejected its proposal in writing on May 3, 1979, that its effort at correction was insufficient.
2. GAO believes that issue of whether protested procurement is justified on sole-source basis is moot at this point. Agency now admits that information given by awardee that manufacturer's spare parts could not be provided to anyone else was erroneous. Moreover, record indicates that agency entered into discussions with protester on its unsolicited proposal notwithstanding fact that procurement had been solicited on sole-source basis.
3. GAO believes that agency's determination that protester's proposal was unacceptable was reasonable. While it is true that protester demonstrated during course of protest that manufacturer would provide spare parts, record shows that at time of procurement contracting officer had no evidence from protester that it could obtain spare parts from sources other than awardee.

Kranz
DLG 03829

(add)
Sole source
Procurement
Bid rejection

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[Protest Against Contract Award]

Security Assistance Forces & Equipment International Inc. (Safe) protests the award of a contract to Franz Garny GmbH & Co. (Franz Garny) under request for proposal (RFP) No. DAJA37-79-R-0152 issued by the United States Army Procurement Agency, Europe. The solicitation was for the maintenance, inspection and repair of alarm systems installed at American Express Military Banking facilities located on United States Army sites throughout Germany. ✓
AUC 315

On January 29, 1979, the contracting officer made a written determination and finding that it was impracticable to secure competition for the above-described repair and maintenance services and obtained approval to solicit these services on a sole-source basis. The solicitation was prepared, reviewed and approved for mailing to Franz Garny on February 8, 1979, with a closing date of February 22, 1979. On the closing date, the contracting officer received a proposal from Franz Garny and an unsolicited proposal from Safe. However, Safe's proposal did not contain the parts price list specified in the solicitation. Rather, Safe stated that such a list would be furnished before the commencement of the contract work and that Safe had written the supplier of the alarm systems for a price list but had not received a reply.

On March 30, 1979, the contracting officer submitted the procurement file to the Board of Award. The report of the board noted the unusual situation of receiving an unsolicited proposal on a sole-source procurement. Nevertheless, in order to preclude a possible protest by Safe, the board recommended that the contracting officer contact the company and inform it that the proposal was not responsive, giving reasons why it was not. After the contracting officer obtained assurance that Safe was able to comply with the requirements of the solicitation, the Board of Award further recommended that Safe be required to furnish a letter from Franz Garny to the effect that the latter company is willing and has made arrangements to supply Safe with the spare parts necessary to service and maintain the alarm systems. If the contracting officer obtained this information, then negotiations with both offerors were to be conducted in order to arrive at a fair and reasonable price. However, if the information

was not obtained from Safe, the board concluded that the contracting officer must make a determination of unacceptability.

The contracting officer telephoned the president of Safe on April 9, 1979, and informed him that the company's proposal was considered unacceptable as submitted. In addition to requesting the above-described letter from Franz Garny and the repair parts and price list required by the RFP, the contracting officer stated that logistical support was not and would not be provided for in the procurement. If the fact that no logistical support was provided for modified Safe's offer, the contracting officer requested the company to advise him of this in writing. The contracting officer then told Safe's president that the requested information was required by close of business on April 16, 1979.

Safe responded to the contracting officer's telephonic requests by letter dated April 16, 1979. In this letter Safe stated that it was willing to negotiate on the matter of logistic support and that it certified that it would supply all parts required to complete the contract. As to the matter of Franz Garny supplying other companies with spare parts, Safe declared that it had not received a response from either Franz Garny or the manufacturer of the parts, the Mosler Safe Company (Mosler). Also, Safe indicated that if Franz Garny was refusing to supply other companies with parts or prices, this amounted to a violation of United States law. In this regard, Safe cited section L-7 of the RFP which it contended would preclude the Government from accepting an offer from any firm which it knows is acting in violation of United States law.

By letter dated May 3, 1979, the contracting officer informed Safe that an award had been made to Franz Garny on April 27, 1979. The letter also stated that Safe's offer initially was not considered acceptable in that it did not provide a parts listing and price list and that the contracting officer had attempted through negotiation to make Safe's offer acceptable. In lieu of the required list, Safe had merely stated that it would supply all parts required

to complete the contract, which statement the contracting officer determined to be unacceptable to correct the noted deficiency in Safe's proposal.

By letter dated May 4, 1979, and received by us on May 14, 1979, Safe protested the determination that its offer was unacceptable.

Safe contends that it furnished a reasonable alternative to the parts and price list and that not furnishing this list was a spurious reason for rejecting Safe's offer. In this regard, Safe refers to another RFP issued by the Army having a similar requirement for a price list of spare parts where none of the offerors furnished a listing and the Army did not use this as a reason for rejecting any of the offers. Also, Safe alleges that a spare parts price is not published by Mosler so that any list Franz Garny furnished the Army was one it produced itself.

With respect to the contracting officer's request for a letter from Franz Garny indicating that spare parts would be furnished to it, Safe argues that Franz Garny was just another offeror. Thus, Safe claims that there was no justification for requiring it to have a letter from a competitor on the matter since its word on the availability of spare parts is as good as Franz Garny's. Moreover, Safe believes that requiring it to gain such a letter from a firm that it was in direct competition with was highly improper.

Safe also asserts that even though it is not provided for in the solicitation, a provision for logistic support by the Government could still be negotiated. In Safe's opinion, the important thing is that nothing in the RFP precluded the Government's furnishing logistic support. Therefore, Safe believes that such support could be provided as long as the Government was properly compensated for it.

The Army contends that Safe's protest is untimely. The Army argues that the contracting officer clearly conveyed to Safe on April 9, 1979, his intent to take a position adverse to that company. In this regard, the Army claims that Safe was informed that its offer was considered to be unacceptable and its proposal

would be rejected as unacceptable unless certain deficiencies were remedied by April 16, 1979. Consequently, because Safe's April 16, 1979, letter failed to correct these deficiencies, the company should have known that its proposal would be rejected by the contracting officer not later than April 16, 1979. The contracting officer's letter of May 3, 1979, was no more than a recapitulation of the information that had been communicated to Safe on April 9, 1979. According to the Army, then, Safe was fully cognizant of the basis for its protest on or before April 16, 1979. Thus, Safe's protest which was filed with us on May 14, 1979, was filed more than 10 working days after the company knew or should have known the basis for protest.

Turning to the merits of Safe's protest, the Army initially stated that the required repair and maintenance services were solicited on a sole-source basis from Franz Garny because the contracting officer determined that the alarm system manufactured by Mosler consisted of "proprietary types of equipment" and that Franz Garny did not disclose any technical data nor supply spare parts to other companies. Further, Franz Garny had advised that its alarm systems were serviced exclusively by its own personnel. The Army pointed out that this position of Franz Garny was consistent with the one it took in refusing to supply brand name items to Safe in connection with Safe's protest to this Office 3 years ago involving solicitation DAJA37-76-R-0250. See Security Assistance Forces & Equipment International Inc., B-186428, September 29, 1976, 76-2 CPD 293.

Indeed, Franz Garny maintains that the Mosler brand name alarm systems which were installed by Franz Garny for the Army should only be serviced and repaired by Franz Garny technicians. Franz Garny avers that it takes this position because Mosler alarm systems which are of highest quality must be repaired by technicians trained by Mosler service supervisors and because Franz Garny is required by an exclusive Dealers Agreement with Mosler to carry the responsibility to install, service and maintain Mosler products. If the Mosler alarm systems are worked upon by unauthorized persons or are improperly handled, Franz Garny alleges that Mosler's warranty on these systems will be forfeited.

Nevertheless, during the course of this protest, Safe has provided the Army with letters from Mosler and its parent company, American Standard, Inc., which contain statements contradicting those made by Franz Garny. These letters indicated that Mosler does not insist either that its alarm systems be maintained and repaired only by Mosler employees or that its spare parts be distributed on a restricted basis. Rather, they indicate a complete willingness on the part of Mosler to sell parts to Safe.

The Army now admits that the information given to it by Franz Garny was erroneous. However, the Army asserts that the unauthorized attribution of Franz Garny's own policies to Mosler did not affect the propriety of the original sole-source justification and that Franz Garny is still the only known source in Germany which can maintain the Mosler alarm systems. According to the Army, a successful offeror needs more than access to repair parts to perform the contract. Service manuals and circuit diagrams, which the Government did not acquire, and which Franz Garny possesses, are also essential to contract performance. Further, technicians trained in the use of these manuals and diagrams are required. The Army believes that regardless of whether Safe can provide the necessary manuals, diagrams, and trained technicians in the future, it is clear that the company was not able to do so at the time the repair and maintenance service being protested was solicited and awarded.

We do not believe Safe's protest is untimely. Safe states that it was supplying information in its April 16, 1979, letter which it felt was sufficient to comply with the contracting officer's April 9, 1979, requests. Safe's April 16, 1979, letter was followed by an April 18, 1979, telex which stated that the spare parts price list had not as yet arrived, but that Safe would either deliver spare parts at prices no higher than those on the published price list of Franz Garny or would include the supply of all component parts at already quoted prices in lieu of the Government furnishing logistic support. Also, Safe reiterated that it was certifying the supply of all parts required to complete the contract. Under the circumstances, we think that Safe made certain assurances in a good-faith

effort to correct the proposal deficiencies outlined by the contracting officer. Consequently, we conclude that the company should not have known that the Army would find Safe's assurance to be insufficient until the contracting officer so notified it in writing on May 3, 1979. 4 C.F.R. § 20.2(b)(2) (1979).

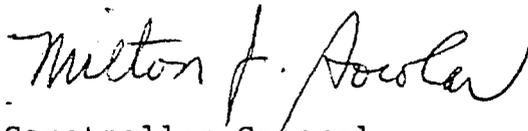
We also fail to understand at this point in time the Army's continued insistence on justifying this procurement on a sole-source basis. We note that Safe claims to have been a distributor of Mosler and, thus, possesses manuals and schematics of Mosler alarm systems. Further, it is not clear from the record that these alarm systems require sophisticated technical expertise in order to be properly serviced. In this regard, Safe contends the alarm systems are low technology equipment which can be maintained by any good electronics technician. Finally, the record indicates the Army entered into discussions with Safe on its unsolicited proposal notwithstanding the fact that the procurement had been solicited on a sole-source basis. Safe was given an opportunity to revise the major deficiencies in its proposal. In view of the foregoing, we believe that the real issue in this protest is whether the Army's determination that Safe's proposal was unacceptable was reasonable. See Documentation Associates, B-190238, March 23, 1978, 78-1 CPD 228, and the cases cited therein.

It is our opinion that the Army properly rejected Safe's proposal. The record reveals that Safe was unable to convince the Army that it could provide the spare parts necessary to perform the contract. While Safe did indicate in its April 18, 1979, telex that the spare parts price list had not yet arrived in the mail, it gave no assurance as to precisely when this list would be arriving. Moreover, the contracting officer never received the list prior to making the contract award to Franz Garny on April 27, 1979. This coupled with the fact that Franz Garny had refused to supply other companies with spare parts led the contracting officer to reasonably believe that Safe had no access to the required spare parts. It is true that Safe later showed that Mosler was willing to directly provide it with parts. Nevertheless, at the time of the procurement, the contracting officer had

no evidence from Safe that it could obtain spare parts from sources other than Franz Garny. Indeed, Safe wrote the contracting officer a letter dated April 30, 1979, stating that it had received two letters written by European suppliers of spare parts and that both had refused to furnish spare parts to any other firm.

Safe asserts that Franz Garny's refusal to supply spare parts violates antitrust laws. We have held that violations of the antitrust laws relating to restraint of trade are matters properly for the consideration by the Department of Justice and not our Office. See Security Assistance Forces & Equipment International Inc., supra. In any event, Safe now has the capability of obtaining spare parts from the alarm system manufacturer itself. Presumably, this is what has prompted the Army to state to us that it will make a determined attempt to secure competition on the follow-on requirement for Mosler alarm repair and maintenance services.

The protest is denied.



For the Comptroller General
of the United States