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Pl. II

DECISION

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

[Protest of Contract Award to Foreign Firm]

FILE: B-195101; B-195101.2 DATE: April 8, 1980

MATTER OF: Hawaiian Dredging & Construction Company, a Dillingham Company; Gibbs & Hill, Inc.

DIGEST:

1. Protest alleging that solicitation's stated evaluation method is inappropriate is untimely and will not be considered on merits when filed after date set for receipt of initial proposals.

2. Protest against award of contract to foreign firm on basis that contract effort may have significant impact on U.S. energy policy and thus should be performed by U.S. firm is denied, since solicitation did not limit award to domestic firms, and no other legal basis exists to restrict award in that respect.

3. GAO review of bid protest is limited to considering agency's adherence to procurement policies and procedures prescribed by existing law and regulation, and where no legal basis exists to preclude contract award to foreign firm, question of whether such award should be made is matter for consideration by Congress or Executive branch, not GAO.

4. Evaluation factor imposed under Buy American Act does not apply in procurement of research services.

5. Determination of relative merits of proposals is responsibility of procuring agency and will not be disturbed unless shown to be arbitrary or contrary to statutes or regulations.

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Hawaiian Dredging & Construction Company, a Dillingham Company, with its proposed subcontractor, Gibbs & Hill, Inc. (HD&C), protests the award by the Department of Commerce of a contract to Delta Marine Consultants, B.V. (Delta), a Dutch firm, under request for proposals (RFP) No. MO-AO1-78-4199 for the evaluation of the construction and installation processes for commercial Ocean Thermal Energy Conversion (OTEC) plants. The thrust of the protest is that the contract should not have been awarded to a foreign firm, since the effort is in an area that evidently has a potentially significant impact on the American energy program. In this respect, HD&C contends that Commerce failed to apply to Delta's offer the additional evaluation factor imposed under the Buy American Act, 41 U.S.C. § 10a-d (1976). HD&C also asserts that the use of a numerical scoring system to evaluate proposals as provided in the RFP was not appropriate for this project, and that HD&C's proposal in any event was more advantageous to the Government than was Delta's.

For the reasons set forth below, the protest is dismissed in part and denied in part.

Initially, we point out that the question raised regarding the evaluation scoring method involves an alleged solicitation impropriety. Since the protest was not filed prior to the date set in the RFP for the receipt of initial proposals, this basis for protest is untimely under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1979), and will not be considered on the merits.

An OTEC plant is intended to generate electric power by extracting the solar energy stored in warm ocean surface waters. Proposals were requested for a contract to assess the construction and installation requirements for commercial OTEC plants, to determine the present domestic and foreign technological capabilities to satisfy those requirements, to develop a construction and installation plan, and to submit a final comprehensive report on those efforts. Proposals were to be evaluated in five areas: (A) Understanding

of the Problem -15 points; (B) Planned Approach - 45 points; (C) Experience in Offshore Structure Design, Fabrication, Construction, Deployment and Installation - 20 points; (D) Management Plan - 20 points; and (E) Evaluated Cost - 20 points. Award was to be based on the most advantageous technical/cost ratio.

HD&C scored 79.3 points out of the 100 maximum for the technical factors (A)-(D), and 19.2 points for its cost proposal of $262,790. Delta's technical score was 87.6, and its cost score was 20 based on its proposed cost of $252,268. Since Delta submitted the highest rated technical proposal at the lowest cost, the contract was awarded to that firm.

With respect to the award to a foreign firm, HD&C suggests:

> " * * * If the U.S. Government wants and needs U.S. industry support and input then contracts should be awarded to them. It is considered fundamental that participation by the U.S. construction industry in a contract requiring an assessment of U.S. construction capabilities should be accomplished by U.S. firms familiar with the entire broad spectrum of activities and capabilities existing today within the U.S. construction industry.
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> " * * * it is not in the best interests of the U.S. Government to build up the expertise in foreign industries for the construction of OTEC plants when U.S. industries are capable and willing to perform contract services equivalent in quality and price in a competitive manner. We contend, that it is essential that government contracting procedures be followed in such a manner that not only the good will of the American construction industry is maintained, but also

> an in-depth capability is developed to support all aspects of the energy program and particularly the ocean program associated with solar energy. Certainly, U.S. Government contracting procedures should not assist the development of a European expertise and capability to compete with U.S. industry for overseas market."

We first point out the RFP contained no restriction against the submission of proposals by foreign firms, so that if the protester is asserting that competition should have been so restricted, the protest is also untimely under section 20.2(b)(1) of our Bid Protest Procedures, since it was not filed prior to the date set for the receipt of initial proposals. Moreover, since the contract effort is not limited to an assessment of domestic construction capabilities, HD&C's suggestion that it would be in the better position to perform that review is not persuasive.

In any case, we are aware of no legal requirement which would restrict award to domestic firms. To the extent that the protest questions whether such a requirement should exist, we view it as a matter for consideration by the Congress, not our Office. The reason therefor is that our consideration of bid protests is predicated on our statutory duty to pass upon the legality of the expenditure of public funds. 31 U.S.C. §§ 71, 74 (1976). Thus, our review of bid protests is limited to considering an agency's adherence to the procurement policies and procedures prescribed by existing laws and implementing regulations. See Garland Bertram, B-191055, March 3, 1978, 78-1 CPD 167. Accordingly, we have no basis to object to the award of this contract to a foreign firm per se as suggested by the protester.

We also believe that there is no legal merit to HD&C's contention that the agency failed to apply to Delta's proposal the additional evaluation factor imposed under the Buy American Act, supra (the Act), and its

implementing regulations. In this regard, the Act provides that "only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured * * * in the United States, shall be acquired for public use." (Emphasis added.) To implement that provision, Executive Order (E.O.) No. 10582, December 17, 1954, as amended by E.O. No. 11051, September 27, 1962, and Subpart 1-6.1 of the Federal Procurement Regulations, (1964 ed.), further describe the subject matter to which the Act applies, and prescribe that in evaluating a bid or proposal to furnish a foreign end product an additional six percent factor is to be added to the cost thereof. The above application of the Act was referenced in the RFP's General Provisions.

The record shows that Commerce did not apply the six percent cost factor in evaluating Delta's proposal because in the agency's view the end-product of the contractual effort was "a paper study final report," and not a "manufactured" article. HD&C disputes that characterization. We agree with Commerce that the Act was not applicable.

In our view, the final report cannot be considered a "manufactured" product either under the Act or under any generally accepted definition. Rather, we view the report merely as being incidental to the primary purpose of the procurement -- to obtain an outside effort to conduct the studies described above. Obviously, many contracts for services involve some material end-product, such as a report, as a manifestation of those services; that fact does not necessarily alter the character of the contract to make the Act applicable. MRI Systems Corporation, 56 Comp. Gen. 102 (1976), 76-2 CPD 437; Blodgett Keypunching Company, 56 Comp. Gen. 18 (1976), 76-2 CPD 331. In contrast, we point out that once the construction and installation requirements and plans for OTEC plants are established, the actual work may be subject to the preference stated in the Act for the use of domestic materials. 41 U.S.C. § 10b (1976).

HD&C's assertion that its offer in any case was more advantageous to the Government than Delta's is based on the firm's view that one of its proposed subcontractors, a Norwegian firm, is better qualified than the one proposed by Delta under evaluation factor (C), which states:

> "It is desirable that the offeror be experienced in offshore engineering, construction and deployment. This experience shall be demonstrated by past involvements and participations in large offshore projects. Experience on large offshore structures demonstrated in such areas as the North Sea, can be of value in the successful completion of this project. Such experience shall be evaluated as a measure of potential for success in completion of this work."

We have been informally advised by Commerce that Delta scored slightly higher under this factor than did HD&C.

HD&C does not complain that Delta's subcontractor is not experienced, only that HD&C's is more so. However, the RFP further provides that "award will not necessarily be made for technical capabilities that would appear to exceed those needed for the successful performance of the work." We also have been informally advised by Commerce that HD&C was advised during negotiations that it received a lower score here in large part because it proposed only a limited degree of involvement by the Norwegian subcontractor.

In any event, the determination of the merits of a proposal is the responsibility of the contracting agency, since it must bear the burden of any difficulties incurred by reason of a defective evaluation. Airport Management Systems, Inc., B-190296, May 25, 1978, 78-1 CPD 395. Accordingly, we have held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals, and thus we will not substitute our judgment unless the evaluation is shown to be arbitrary or in violation of the procurement statutes and regulations.

Industrial Technological Associates, Inc., B-194398.1, July 23, 1979, 79-2 CPD 47. No such showing has been made here.

Accordingly, we conclude that the contract award to Delta was based on an evaluation in accordance with the criteria under which HD&C, by submitting a proposal without protest, agreed to compete.

The protest is denied.

Milton J. Socolar

For the Comptroller General
of the United States