13654

Eaton
82-11

DECISION

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

FILE: B-195523 DATE: May 5, 1980

MATTER OF: Galileo Electro-Optics Corporation

4593

DIGEST:

When large corporation which decides to "buy into" contract to demonstrate manufacturing capability is found responsible, and all agency procurement personnel are alerted to practice, so as to prevent recouping of loss through modifications, changes, or options, GAO finds no legal basis to object to award. However, agency should take vigorous steps to obtain effective competition for subsequent production contracts, so that firm does not become sole source.

Galileo Electro-Optics Corporation (Galileo) protests [against] the award of a contract by the Army Communications and Electronics Materiel Readiness Command (CERCOM), Fort Monmouth, New Jersey, to International Telephone and Telegraph Corporation (ITT), Electro-Optical Products Division. For the reasons outlined below, we have no legal objection to the award.

DLG 02664

4594

In a two-step negotiated procurement, both Galileo and ITT submitted acceptable, unpriced technical proposals for a Manufacturing Methods and Technology (MM&T) Program. According to the Army, an MM&T is designed to serve as a bridge between research and development and actual production; this particular one was to develop automated methods for drawing fiber optic cable to 40 kilometers and to demonstrate capability to produce a cable of that length, meeting certain performance specifications, in a 40-hour week.

Galileo contends that ITT had an unfair competitive advantage, since it had performed at least 10 research and development contracts for fiber optic cable design since 1975 and, as a result, could offer a lower price in the second step of the procurement than Galileo.

112238

~~010192~~

Galileo states that it requested, but did not receive, ITT cable design data, and therefore assumed that it was not available until, at a debriefing, it learned that ITT not only had provided the Army with such data but also had produced a prototype meeting Army specifications. Thus, Galileo argues, the two firms were not faced with the same scope of work, since Galileo "would have had to undertake a development program to carry its technical proposal to the point of producing prototype cable * * *, a very expensive task and one not required of the only other bidder."

The Army responds that Galileo, in effect, is alleging that the solicitation was deficient because it failed to include cable design data; since this lack was apparent before the initial closing date for receipt of step-one proposals, the Army would have us rule that Galileo's protest, filed months thereafter, is untimely.

In any event, the Army argues, the fact that ITT had design data and had produced a prototype did not give it a competitive advantage, since what was sought was a showing of manufacturing capability, not an acceptable cable design. Offerors could demonstrate capability, the Army maintains, by using any one of several cable designs for which prototypes existed and which were described in available literature.

None of these arguments is relevant, in our opinion, when ITT's price proposal is considered. Because this was a negotiated procurement, full information on that proposal has not been made available to Galileo. However, it is clear from ITT's cost estimates, included in the record, that but for ITT's decision to absorb a substantial loss, Galileo would have been the lowest-price step-two offeror and, under terms of the solicitation, would have been entitled to award. ITT gained no competitive advantage, in terms of price, during the course of prior contracts, since the actual cost of the work outlined in ITT's technical proposal was greater than Galileo's offered price.

Defense Acquisition Regulation (DAR) § 1-311 (1976 ed.) states that the Department of Defense does not favor the practice of "buying in," or below-cost bidding. The regulation requires contracting officers to take steps

to assure that amounts not included in the original contract price are not subsequently recouped. A "buy in," however, is not a valid basis for challenging an award, and a below-cost bid may not be rejected unless the contractor who is offering to perform at a loss also is found nonresponsible. See Northwestern State University of Louisiana, B-196104, October 15, 1979, 79-2 CPD 256, and cases cited therein.

The Army states that all personnel involved in the procurement have been alerted to the "buy in." Moreover, the Army adds, the contract does not contain any unpriced items or options which will allow ITT to regain losses; this is a one-time requirement and any follow-on work will be competed; accelerated deliveries or Government-directed changes are unlikely. The Army concludes that it will monitor performance and will scrutinize any requests for progress payments to make sure that work accomplished is commensurate with the amount sought.

Since the Army has found ITT responsible, we find no legal basis to object to the award. The protest is therefore denied.

The Army, however, should not only monitor ITT's performance of the MM&T Program closely, but also take vigorous steps to obtain effective competition for subsequent production contracts, so that ITT does not become its sole source of fiber optic cable at a price which may far exceed the amount of the "buy in." By letter today, we are advising the Secretary of our views.

Milton J. Socolar

For the Comptroller General
of the United States