Yudenfriend
PL - GCM
14407

DECISION

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

FILE: B-194876 DATE: July 28, 1980

MATTER OF: Security Assistance Forces & Equipment International, Inc.--Reconsideration

Request for Reconsideration of Decision Upholding

DIGEST:

1. Agency determination of contractor's nonresponsibility was reasonable and in good faith so determination was proper.

2. Inspection of contractor's facilities involved in preaward survey does not violate Fourth Amendment of United States Constitution protecting against unreasonable searches.

3. GAO does not have authority to determine violations of Magnuson-Moss Act.

Security Assistance Forces & Equipment International, Inc., (SAFE), requests reconsideration of our decision in Security Assistance Forces & Equipment International, Inc., B-194876, May 5, 1980, 80-1 CPD 320. In that decision, we held it was proper for the Army to cancel solicitation No. DAJA37-79-R-0164 for a repair and maintenance contract of an executive nurse call system at the United States Army Hospital in Nuernberg, Germany, based on its determination that, due to the system already installed in the hospital, the contract was capable of being performed by only one firm. In making this decision, we found that the Army had reasonably and in good faith determined partly by means of a preaward survey that SAFE was nonresponsible.

Before awarding any contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. Defense Acquisition Regulation (DAR) § 1-904.1 (1976 ed.). If the information the contracting officer receives does not clearly indicate the responsibility of the prospective contractor, a determination of nonresponsibility is required. DAR § 1-902.

~~011467~~

112884

In the instant case, the contracting officer had reason to believe that SAFE, the only company that timely submitted a proposal, would not be responsible because of an inability to supply the necessary spare parts. This was based in part on SAFE's indication in its proposal that it had not at that time arranged to obtain the spare parts but that it was in the process of doing so and that it would be able to "furnish a spare parts price list before commencing work on the contract." The contracting officer was also informed by the company that had installed the original system, ESAG, that only authorized technicians of ESAG or of the manufacturer of the system, Executone, could obtain the necessary repair parts for the system. In light of this information, the contracting officer decided to conduct a preaward survey to make certain that SAFE would be responsible. Such a survey is authorized by DAR § 1-905.4.

The negative preaward survey determination was based upon a number of factors. These included SAFE's failure to permit an onsite survey of its facility, SAFE's failure to conduct an inspection of the actual system already installed in the hospital and the fact that SAFE did not have spare parts for the system either in stock or readily available. All of these factors indicated that SAFE was nonresponsible.

In its submission requesting reconsideration, SAFE discusses these factors. However, most of the points SAFE raises were considered in our prior decision and are not legal or factual grounds which would lead us to alter that decision. See the provisions of our Bid Protest Procedures governing reconsideration at 4 C.F.R § 20.9 (1980). Thus, we will only deal with the arguments not previously considered in this case.

First, SAFE argues that the Army's request to survey its facility without expressing specific reasons for doing so is violative of its rights under the Fourth Amendment to the United States Constitution in that the contracting officer would be unreasonably searching

SAFE's property without cause and without a court order. However, in an earlier decision involving SAFE, Security Assistance Forces & Equipment International, Inc.--Reconsideration, B-196008, June 5, 1980, 80-1 CPD 387, we held that the preaward survey was not violative of the Fourth Amendment.

Next, SAFE argues that it was responsible. It claims that it was familiar with the executive nurse call system because it had inspected a similar system at a different hospital. Also, contrary to assertions made by ESAG and Executone, SAFE maintains that it could have supplied the necessary spare parts. SAFE points out that a contractor does not have to purchase spare parts in advance for every contract it bids on and that, although SAFE may not have had the spare parts in stock during the preaward survey, they were readily available through the company of Maynard E. Harp & Son, Inc., of Baltimore, Maryland, in the event that SAFE was awarded the contract. SAFE concludes that we have unfairly accepted the word of its competitors as to its ability to obtain these parts.

According to the record, SAFE was given ample notice that the contracting officer questioned its responsibility. At that time, SAFE had an obligation under DAR § 1-902 to affirmatively demonstrate its responsibility. Instead of making this demonstration, however, SAFE refused to permit a survey of its facilities, did not inspect the actual system already installed in the hospital and did not provide more specific information concerning its ability to obtain spare parts. In light of the findings the contracting officer was actually able to make and SAFE's lack of cooperation in the preaward survey, the determination that SAFE was nonresponsible is reasonable.

This determination is supported by our decision in Collins Machinery Corporation, B-184428, November 4, 1975, 75-2 CPD 277. There we held that a prospective contractor was properly determined to be nonresponsible when that determination was largely based on two factors:

(1) the contractor's failure to adequately demonstrate its responsibility and (2) its failure to cooperate in a preaward survey.

Finally, SAFE argues that Executone colluded with ESAG to restrict competition by refusing to supply SAFE with the spare parts it needed to implement this contract. SAFE claims that ESAG and Executone are therefore in violation of the Magnuson-Moss Act, 15 U.S.C. § 45, et seq. (1976), which prohibits unfair methods of competition.

Our Office does not have authority to consider violations of this act. Any complaints concerning restraint of competition should be referred to the Federal Trade Commission.

For the foregoing reasons, our prior decision is affirmed.

Milton J. Socolar

For the Comptroller General
of the United States