DECISION

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

26322

FILE: B-212139 **DATE:** September 23, 1983

MATTER OF: Syosset Laboratories, Inc.

DIGEST:

1. Allegation that the contracting officer showed bad faith throughout the procurement process is denied, where the protester has not proven that the contracting officer directed his actions with the specific and malicious intent to injure the protester.

2. Protester lacks a reasonable basis for urging that it should receive award on two solicitation items, when its best and final offers for those items were not low and award was based on price. Further, acceptance of a below-cost offer is not inherently illegal.

Syosset Laboratories, Inc. (Syolabs) protests the award of a contract to Westwood Pharmaceuticals, Inc. for three pharmaceutical products under request for proposals (RFP) No. DLA120-83-R-0594 issued by the Defense Personnel Support Center (DPSC) in a shared procurement program with the Veterans Administration (VA). Syolabs alleges that the contracting officer acted in bad faith throughout the procurement process, that it is entitled to award on those three items, and that certain requirements of the solicitation were unduly restrictive of competition. We deny the protest.

The solicitation called for the procurement of 22 pharmaceutical products to supply all of the annual requirements of both the DPSC and the VA. Thirteen of the items requested (Nos. 0001 to 0013) were DPSC requirements which were identified on a generic name basis. The remaining nine (Nos. 0014 to 0022) were VA requirements for brand name items, all products manufactured by Westwood. According to VA practice, an item that is procured on a brand name basis is identified by an "A" suffixed to the last numeral of the national stock number. Of the nine VA items, only two of them, items 0017 and 0020, did

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not have the "A" suffix. However, those two items had, like the remaining seven, a brand name in parentheses after the product description. The solicitation notified all prospective offerors that:

> "FOR THE VA ITEMS, ONLY THE BRAND NAME SHOWN AFTER EACH ITEM DESCRIPTION WILL BE ACCEPTED."

Historically, the items required had been procured from Westwood on a sole-source basis. Although competition was sought under this solicitation, the contracting officer did not expect other offers as Westwood was regarded as the only known source at that time. Westwood was the sole offeror on 13 of the items, but additional offers were received on the remaining items as follows:

	ITEM NUMBER								
	0005	0007	0015	0016	0017	0018	0020	0021	0022
Westwood	2.85	1.56	2.90	2.80	1.06	2.70	1.25	1.70	1.51
Syolabs	1.85	--	2.00	1.65	.92	2.00	1.05	1.55	1.32
Ambix Labs	--	.86	--	--	--	--	--	--	--
Noble Pine	--	--	--	--	.94	--	1.09	--	--

Because the low offers received on items 0015, 0016, 0018, 0021 and 0022 were not the brand names desired by the VA, the VA advised the contracting officer to delete them from the solicitation. Apparently, items 0017 and 0020 were retained because even though Syolabs, the low competitor, offered generic products, the item descriptions lacked an "A"-suffixed product number indicating that they were brand names, and the VA found the generic products acceptable.

Amendment 0001 was then issued which eliminated the brand name specification for items 0017 and 0020, deleted items 0015, 0016, 0018, 0021, and 0022 from the solicitation, and requested best and final offers on items 0005, 0007, 0017, and 0020. Best and final offers were received as follows:

	ITEM NUMBER			
	0005	0007	0017	0020
Westwood	1.85	1.05	.72	.755[1]
Syolabs	1.85	--	.92	1.05
Ambix Labs	--	.86	--	--
Noble Pine	--	--	.89	.99

Therefore, Westwood was low on items 0017 and 0020, Ambix was low on item 0007, and Westwood and Syolabs were tied on item 0005.

In resolving the tie, the contracting officer relied upon Defense Acquisition Regulation (DAR) § 2-407.6 (1976 ed.), which provides, in part, that where bids are equal "in all respects" preference for award shall be given to a small business. As Syolabs was a small business, the contracting officer resolved the tie in its favor. However, upon evaluation of Syolabs' offer, the contracting officer found the firm nonresponsible, as it had failed to comply with clause K54 of the solicitation. That clause provided that offers on item 0005, among others, had to satisfy the Acquisition & Distribution of Commercial Products (ADCP) test which requires that such an offered item must be in regular production and must be sold in substantial quantities to the general public and/or industry. As Syolabs had submitted data that it only sold 600 units of item 0005 annually, the contracting officer felt that the firm had not satisfied the ADCP test. Because Syolabs was a small business, the contracting officer referred the matter of Syolabs' responsibility to the

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[1] Westwood's offer on item 0020 was originally expressed as 75.5. Suspecting a clerical error, the contracting officer so notified Westwood. The firm responded in writing that it had indeed made a clerical error and that the intended price was .755. We have held that correction of an obviously misplaced decimal point in circumstances such as present here is permissible. See Engle Acoustic & Tile, Inc., B-190467, January 27, 1978, 78-1 CPD 72.

Small Business Administration (SBA) for possible issuance of a Certificate of Competency (COC). The contracting officer made the same ADCP finding with regard to Ambix's offer on item 0007, and likewise referred the matter to the SBA.

In the interim, however, DPSC determined that the contracting officer had erred in resolving the tie under DAR § 2-407.6 because he had failed to apply the provisions of clause M08 of the solicitation, incorporating by reference DAR § 7-2003.23(b), which provides:

> "EVALUATION OF OFFERS FOR MULTIPLE AWARDS (1982)
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> "In addition to other factors, offers will be evaluated on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards). For the purpose of making this evaluation, it will be assumed that the sum of $250 would be the administrative cost to the Government for issuing and administering each contract awarded under this solicitation, and individual awards will be for the items and combinations of items which result in the lowest aggregate price to the Government, including such administrative costs."

As DPSC relates, clause M08 required that the $250 factor in effect be added to Syolabs' total offered price on item 0005 because Westwood was in line for award on the remaining items of the procurement.[2] Therefore, the contracting officer determined that award should go to Westwood as the low offeror on item 0005, and he then canceled the COC referral.

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[2] As Ambix failed to submit required data concerning its responsibility, the SBA declined to issue it a COC. Accordingly, Westwood as the remaining low offeror was in line for award on item 0007 as well.

Syolabs protests that the contracting officer acted in bad faith in finding that Syolabs was nonresponsible because it failed to meet the ADCP test of regular production and substantial sales on item 0005; in applying clause M08 to the evaluation of Syolab's offer; and in canceling the COC referral. Syolabs further argues that the firm is entitled to award on item 0005 and on items 0017 and 0020 as well, and that the VA requirement for brand name items was unduly restrictive of competition. We find no legal merit to the protest.

To show bad faith, a protester must meet the heavy burden of submitting essentially irrefutable proof that the contracting officer directed his actions with the specific and malicious intent to injure the firm. Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD 25. Here, the contracting officer, with one exception, correctly followed applicable procurement regulations. That one exception was his mistaken reliance upon DAR § 2-407.6 in an attempt to resolve the apparent tie between Westwood and Syolabs, an error which the firm must realize was made in its favor. Generally, that section would operate in a situation where a clear tie exists. In this case, however, there was no actual tie because the contracting officer was required to apply the provisions of clause M08 to the evaluation of offers and add $250 to Syolabs' total price on item 0005. As a result, no tie existed and his reliance on DAR § 2-407.6 was clearly erroneous. Therefore, while it is unfortunate that the COC process was initiated, thereby indicating to Syolabs that it was in line for the award, the COC referral in fact was academic and was properly canceled. We thus need not examine Syolabs' challenge to the ADCP test[3] because the firm is not in line for award on item 0005 and any issue of responsibility consequently is irrelevant.

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[3] Syolabs has argued that the ADCP data it submitted showing production of only 600 annual units of item 0005 contained a clerical error and that the true figure should have been 6,000.

Syolabs has also urged that it is entitled to award on items 0017 and 0020. We do not see the basis for the protester's reasoning on the issue, unless the firm is referring to the fact that it was the low initial offeror on both items. In a negotiated procurement, however, prices offered initially may be reduced in response to a request for a best and final offer. See Alchemy, Inc., B-207338, June 8, 1983, 83-1 CPD 621. That Syolabs chose not to adjust its prices was clearly a matter of its own business judgment. To the extent that Syolabs asserts that Westwood's final offered prices for items 0017 and 0020 were well below the standard commercial prices for those items, we have consistently held that the possibility of a "buy-in" is not a proper basis upon which to challenge a contract award since there is nothing inherently illegal about a buy-in. In such a situation, the contracting officer need only be reasonably assured that the firm submitting such low-priced offers is responsible and that any amounts the offeror excludes in developing its prices are not recovered in the pricing of change orders or otherwise. B. H. Aircraft Company, Inc., B-210798, April 1, 1983, 83-1 CPD 344.

Finally, Syolabs contends that the VA portion of the solicitation requiring brand name items was unduly restrictive of competition. We dismiss the issue as both untimely and moot. Our Bid Protest Procedures provide that a protest alleging improprieties in a request for proposals must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1)(1983). Here, the closing date for receipt of initial proposals was March 2, 1983, but Syolabs' protest to this Office was not filed until June 20. In any event, RFP amendment 0001 deleted all VA brand name items from the solicitation.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States