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

FILE: B-212703, B-212703.2 **DATE:** September 25, 1984

MATTER OF: Alan Scott Industries; Grieshaber Manufacturing Company, Inc.

DIGEST:

1. To the extent that the protester is arguing that the awardee cannot perform the contract in accordance with all its terms, this allegation involves a matter of the awardee's responsibility. This Office will not review an affirmative determination of responsibility unless the protester shows possible fraud on the part of contracting officials or alleges that the solicitation contains definitive responsibility criteria which have been misapplied.

2. Whether the awardee will perform the contract in accordance with all its terms is a matter of contract administration, which is the responsibility of the contracting agency and is not encompassed by our bid protest function.

3. A determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer. We will not question that determination unless it is clearly unreasonable or there is a showing of bad faith or fraud.

4. Solicitation clause reserves to the government the right to select samples of supplies contracted for at any stage of production, for testing at a government laboratory, with shipment of the supplies to be withheld until the contractor is advised of approval of the samples. We determined in a previous decision that this clause meets a legitimate agency requirement for verification of the suppliers' compliance with its contractual obligation to test its own products prior to shipment to the government.

5. While there was a delay in the protester's filing of its FOIA request, that delay was not sufficient to constitute lack of due diligence.

6. The awardee did not correctly fill out its Buy American Act certification to certify that its offered items were participating country end products. However, the items offered could be identified as participating country end products elsewhere in the offer and by reference to other sources. Therefore, the awardee's offer was eligible for foreign qualifying country status and was correctly evaluated on an equal basis with an offer of domestic end product.

7. The concept of responsiveness, which applies to bids submitted in formally advertised procurements, is not directly applicable to proposals submitted in a negotiated procurement which are initially determined to be technically acceptable.

8. Discussions occur if an offeror is given an opportunity to revise its proposal or if the information requested and provided is essential for determining the acceptability of a proposal.

9. Communications confirming an offeror's capability to perform are for the purpose of determining responsibility and do not constitute discussions under negotiated procurement if no opportunity is given to modify a proposal.

Grieshaber Manufacturing Company, Inc. (Grieshaber), and Alan Scott Industries (ASI) protest the award to the Surgical Instrument Company of America (SICOA) by the Defense Logistics Agency (DLA) under request for proposals (RFP) No. DLA120-83-R-0688. The contract was for the supply of a quantity of retractors, which are surgical instruments.

We dismiss in part and deny in part both protests.

BACKGROUND

Eight offers were received in response to the RFP and four were rejected. Of the offers remaining, SICOA's offer of $24.59 was lowest, while Grieshaber's was the next low at $24.97. ASI's offer of $35.85 was the highest received.

The contracting officer determined that there was adequate price competition and that there were no negotiable issues. Therefore, according to DLA, no discussions were conducted and the evaluation and award were based on initial offers.

Pursuant to the Buy American Act, 41 U.S.C. § 10(a)-(d) (1982), and implementing regulations, Defense Acquisition Regulation (DAR) § 6-104.4, reprinted in 32 C.F.R. pts. 1-39 (1983), the RFP provided that offers of "domestic end products" and offers of foreign products from "qualifying countries" would be preferred over offers of products from sources in nondomestic, nonqualifying countries. This preference was to be accomplished by the addition of an evaluation differential to offers from nondomestic, nonqualifying country sources.

The contracting officer determined that SICOA did not offer a domestic end product. It was also determined, however, that the items offered by SICOA were "represented to be participating country end products, as defined by DAR § 6-001(f)" and no differential was added to its offer for evaluation purposes. Since Grieshaber offered domestic end products, no differential was added to its offer for evaluation purposes.

The contracting officer requested a complete preaward survey of SICOA and its subcontractors to assure that SICOA was capable of furnishing a product complying with the specifications and qualifying as a participating country end product. In its report to this Office, DLA stated:

> "The report of the pre-award survey . . . indicated that SICOA was capable of furnishing a conforming item and otherwise complying with the representations and certifications contained in its offer."

Award to SICOA was made on July 27, 1983.

ASI's Protest

ASI contends that SICOA cannot provide the required item in accordance with the specifications at the agreed price of $24.59 if the items are "totally produced in West Germany," the qualifying contrary. ASI also argues that the price, $24.59, is excessive and offers to provide the solicited items at a price of $15.85 each, "exclusive of clause E33," which is discussed below.

To the extent that ASI is arguing that SICOA cannot perform the contract in accordance with all its terms, this allegation involves a matter of the awardee's responsibility. However, DLA determined SICOA to be responsible. This Office will not review an affirmative determination of responsibility unless the protester shows possible fraud on the part of contracting officials or alleges that the solicitation contains definitive responsibility criteria, which have been misapplied. James M. Smith, Inc., B-213063, Oct. 12, 1983, 83-2 C.P.D. ¶ 459.

Additionally, whether SICOA will perform the contract in accordance with all of its terms is a matter of contract administration which is the responsibility of the contracting agency and is not encompassed by our bid protest function. Surgical Instrument Company of America, B-214918, May 22, 1984, 84-1 C.P.D. ¶ 551.

These bases of protest are dismissed.

ASI also contends that the agreed price of $24.59 is excessive. However, the contracting officer determined $24.59 to be a fair and reasonable price based on effective competition. We consistently have held that a determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer. We will not question that determination unless it is clearly unreasonable or there is a showing of bad faith or fraud. Honolulu Disposal Service, Inc.--Reconsideration, 60 Comp. Gen. 642 (1981), 81-2 C.P.D. ¶ 126.

As explained above, four of the eight offers submitted were found unacceptable. After the rejection of these four offers, SICOA's offer of $24.59 was the next lowest

available. There was adequate competition and the award price was determined reasonable.

To the extent that ASI is objecting to the inclusion of clause E33 in the RFP, we have previously considered and denied this issue. See Alan Scott Industries, B-199662, et al., Jan. 27, 1981, 81-1 C.P.D. ¶ 44. Clause E33 (previously identified as clause I14) reserves to the government the right to select samples of the supplies contracted for, at any stage of production, for testing in a government laboratory, with shipment of the supplies to be withheld until the contractor is advised of approval of the samples. We determined in Alan Scott Industries, B-199662, supra, at 2, that this clause meets a legitimate DLA requirement for verification of the supplier's compliance with its contractual obligation to test its own instruments prior to shipment to the government.

These bases of ASI's protest are denied.

Grieshaber's Protest

Grieshaber contends that SICOA's proposal was not acceptable as initially submitted and was not evaluated in accordance with the solicitation. Grieshaber also contends that DLA conducted negotiations with SICOA while not affording Grieshaber the same opportunity as required by 10 U.S.C. § 2304 (1982) and DAR § 3-805, reprinted in 32 C.F.R. pts 1-39 (1983). Also, according to Grieshaber, DLA improperly refused to consider it eligible for a labor surplus area (LSA) evaluation preference on the ground that Grieshaber failed to indicate in its offer that it was an LSA firm.

DLA argues that Grieshaber did not timely file its protest and did not diligently pursue information necessary for its protest under the Freedom of Information Act (FOIA). DLA points out that notice of award was mailed to Grieshaber on July 27, 1983, and that Grieshaber did not protest the LSA issue to DLA until August 19, 1983. DLA contends that this protest was received later than the 10 days allowed under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1984). DLA also argues that if the protest to the agency is considered timely filed, Grieshaber did not timely file its protest with GAO within 10 days of the

initial adverse agency action as required by 4 C.F.R. 1.2(a). DLA considers its letter, dated August 29, 1983, to Grieshaber to be "initial adverse agency action" on the protest to the agency. DLA also contends that since there was a 2-month delay between notice of award and the request for information under the FOIA, the protester did not diligently pursue information under the FOIA as required.

Under our Bid Protest Procedures, a protest not received at GAO within 10 working days after the protester knew or should have known the basis of its protest is untimely. 4 C.F.R. § 21.2(b)(2) (1984). When a protest is filed initially with the contracting agency, a subsequent protest to GAO must be filed within 10 working days after the protester learns of the initial agency action on the protest. 4 C.F.R. § 21.2(a) (1984).

We find that Grieshaber untimely filed its protest of DLA's refusal to consider it eligible for an LSA evaluation preference. In its initial protest to the agency, Grieshaber raised the issue and, in a letter dated August 29, the contracting officer stated that Grieshaber's failure to complete the LSA clause precluded consideration of that firm as an LSA. Grieshaber did not protest to this Office until November 10, more than 10 days after the initial adverse agency action on its protest to DLA. Crawford Technical Services Inc., B-215407, June 20, 1984, 84-1 C.P.D. ¶ 653. Therefore, this basis of protest is untimely and will not be considered.

However, Grieshaber is timely as to its other allegations. The other three bases of protest concern SICOA's offer and communications between DLA and SICOA. Grieshaber did not have notice of these basis for protest until it received DLA's FOIA response on October 31, 1983. It was not until this date that the protester become aware of the contents of SICOA's offer and the communications between DLA and SICOA. Upon receipt of the FOIA response, Grieshaber protested to this Office on November 10, within 10 working days of discovering these bases of protest.

We also find that Grieshaber pursued its protest and its FOIA request with due diligence. By letter of July 27, Grieshaber learned only of the award of the contract. In its August 29 letter, the contracting officer responded to

Grieshaber's protest to the agency. On September 23, Grieshaber filed its FOIA request. Grieshaber filed its protest with GAO within 10 working days of the receipt of the material requested under the FOIA. While there was a delay of approximately 1 month in filing the FOIA request, we do not think that the delay was sufficient to constitute a lack of due diligence. Work System Design, Inc.--Reconsideration, B-200917.2, Sept. 29, 1981, 81-2 C.P.D. ¶ 261. Therefore, these issues will be considered on the merits.

EVALUATION OF SICOA'S OFFER

Grieshaber's principal contention is that SICOA's offer was not evaluated in accordance with the terms of the solicitation. Grieshaber argues that, under a proper evaluation, Grieshaber's would have been the low evaluated offer. Grieshaber also argues that certain omissions on SICOA's part should have resulted in the rejection of SICOA's offer as unacceptable.

First, Grieshaber argues that some Buy American Act price differential should have been applied to SICOA's price since, according to Grieshaber, SICOA failed to certify that its offered product was a "participating country end item."

The RFP included the standard Buy American Act clause, DAR § 7-104.3, and the standard Buy American Act certificate, DAR § 7-2003.47. That certificate, clause K20 of the RFP, required that offerors certify in part "a" that each "end product" was a domestic end product except those that are listed as "Excluded End Products." SICOA listed "ALL ITEMS" as "Excluded End Products," thereby certifying that no end products offered were of domestic origin. The certificate also required offerors to list the "Country of Origin" of all excluded end products. In this blank, SICOA inserted "See Confidential letter." The referenced letter stated:

> "Please be advised that the items marked See Confidential Letter in the above referenced bid is as follows:
>
> "Perfect Chirurgical Instruments Gmbh
> Heidelberg, West Germany"

Part "b" of the certificate stated in part:

> "Offers will be evaluated by giving certain preferences to domestic end products and foreign qualifying country end products over foreign nonqualifying country end products. In order to obtain such preferences in the evaluation of each excluded end product listed in (a) above, it is necessary that offerors identify and certify, below, those excluded end products identified above that are qualifying country end products or they will be deemed nonqualifying country end products. Offers must certify by inserting the applicable line item numbers in the appropriate brackets:"

Part "b" also contained three blanks to indicate that excluded end products were "participating country end products," "FMS/offset arrangement country end products," or "defense cooperation country end products." SICOA's offer had no entries in part "b" of the certificate.

Part "a" of SICOA's offer indicated that no offered end products were of domestic origin and Grieshaber contends that part "b" did not contain a proper certification that SICOA's offered end products were qualifying country end products. Therefore, according to Grieshaber, SICOA's end products should have been deemed "nonqualifying country end products" and, under part "b," some evaluation preference should have been given to Grieshaber's all domestic offer.

DLA contends that SICOA's product could be identified as a participating country end product despite the failure to certify it as such in the certificate. DLA argues that SICOA's product was identified as West German in the attached letter and that West Germany is identifiable as a participating country by reference to other sources.

We agree with DLA.

Under part "b" of the Buy American Act certificate and DAR § 6-104.4(b), a domestic offer and an offer of "qualifying country end product" are evaluated equally, with no evaluation preference added. Under part "b" of the certificate, "participating country end products" are one type of qualifying country end product; therefore, participating country end products are evaluated as equal to domestic end products.

DAR § 6-001.5(c) defines a "participating country" as:

> "A NATO country which has a Memorandum of Understanding (MOU) or similar agreement with the U.S. and for which a blanket Determination and Finding was made by the Secretary of Defense waiving the Buy American Act restrictions. These countries are listed at § 6-1401."

The Federal Republic of Germany (West Germany) is listed in DAR § 6-1401 as a country with a Memorandum of Understanding with the United States; therefore, West Germany is a participating country. Since SICOA certified that all of its offered items were West German "end products," those items are "participating country end products." SICOA's offer of participating country end products or qualifying country end products, as defined by part "b" of the certificate, was correctly evaluated on an equal basis with Grieshaber's offer of domestic end products. DAR § 6-1401.4(b), supra.

Grieshaber also points out that SICOA failed to complete clause L36 of the RFP, which was to identify offered supplies to be accorded duty-free entry. According to Grieshaber, this failure should have resulted in DLA using SICOA's duty-inclusive price of $27.54 for evaluation purposes rather than the duty-exclusive price of $24.59. Grieshaber argues that since its price of $24.97 was lower than SICOA's duty-inclusive price, the award to SICOA was improper.

We do not agree. Clause H75 of the RFP, "Duty Free Entry-Qualifying Country End Products and Supplies" (DAR § 7-104.32), provides for the exclusion of duty from the price of all end items, which constitute "qualifying country end products." As we explained above, SICOA offered qualifying country end products. Therefore, SICOA's offer was evaluated on the basis of its duty-exclusive price as required by clause H75.

Grieshaber also contends that SICOA's failure to complete clause K55 should have been cause for the rejection of its offer. Clause K55 required offerors to specify contract end items or supplies which had been or would be imported and used for contract performance.

Although SICOA failed to complete clause K55, this information was available elsewhere in the offer so this failure was not fatal. As we explained above, SICOA in clause K20 of its proposal and in the enclosed letter identified all end items to be of West German origin.

Grieshaber also contends that SICOA failed to properly complete clause K39, which required offerors to list places of performance. Rather than list its foreign source of supply, SICOA entered in clause K39 "See Confidential Letter Enclosed," which was a reference to the letter discussed above. Grieshaber contends that reference to the enclosed letter "does not satisfy the requirement to identify the U.S. source of specialty metal (i.e., steel)."

Grieshaber also argues that clause K76 of the RFP required the rejection of SICOA's offer. That clause stated:

> "Bidders are cautioned that material elements of the bid - those elements relating to price, quantity, quality or delivery - must be subject to public disclosure. Submittal of such data as privileged information will render the bid nonresponsive and the bid will be rejected."

Contrary to Grieshaber's contention, there was no requirement that SICOA list its source of specialty metal. Clause I42, "Preference For Domestic Specialty Metals," only required that offerors certify that specialty metals to be furnished had been or would be melted in the United States. SICOA complied with this requirement.

Also, the provision quoted above did not require the rejection of SICOA's offer. That provision uses the term "nonresponsive." The concept of responsiveness, which applies to bids submitted in formally advertised procurements, is not directly applicable to proposals submitted in a negotiated procurement, which are initially determined to be technically acceptable, as was the case here. Computer Network Corporation; Tymshare, Inc., 56 Comp. Gen. 245, at 256 (1977), 77-1 C.P.D. ¶ 31. Therefore, failure to comply does not require rejection as would be required in an advertised procurement.

Discussions

Grieshaber also contends that SICOA's proposal was not accepted as initially submitted, but was revised following discussions with SICOA in violation of 10 U.S.C. § 2304(g) and DAR § 3-805, which require discussions with all offerors in the competitive range.

Grieshaber contends that the contract award document (standard form 26) contains evidence that SICOA's proposal was not accepted as initially submitted. Block 26 of that document adds to the final contract two letters from SICOA to contracting officials. Grieshaber argues that the first letter, dated April 9, 1983, extended the acceptance time and delivery schedule and the second letter, dated July 6, 1983, refers to talks with the agency concerning "such things as matte finish versus mirror finish and whether the retractor offered by SICOA contained variations from the solicitation specifications."

Grieshaber also contends that a May 13, 1983, letter to DLA from SICOA is evidence of improper discussions. That letter identifies the source of "US steel" in clause K39 of the RFP as Carpenter Technology Corporation. Grieshaber argues that this information was necessary to determine the compliance of the proposal with the mandatory requirement that specialty metals be of United States origin.

As explained above, DLA asserts that no negotiations were conducted with any offeror and that evaluation and award were made on the basis of initial offers as allowed by the solicitation.

Although, generally, in negotiated procurements, discussions are required to be conducted with all offerors in a competitive range, there are exceptions to this rule. One such exception is where the record shows the existence of adequate competition to ensure that award will result in a fair and reasonable price, provided that the solicitation advised offerors of the possibility that an award might be made without discussions. D-K Associates, Inc., B-213417, Apr. 9, 1984, 84-1 C.P.D. ¶ 396. However, where discussions are held with one offeror, they must be held with all

offerors in the competitive range. New Hampshire-Vermont Health Service, 57 Comp. Gen. 347 (1978), 78-1 C.P.D. ¶ 202. We have held that discussions occur if one offeror is given an opportunity to revise or modify its proposal. Discussions also occur when the information requested and provided is essential for determining the acceptability of a proposal. John Fluke Manufacturing Company, Inc., B-195091(1), Nov. 20, 1979, 79-2 C.P.D. ¶ 367.

As Grieshaber contends, the April 9 letter extended the acceptance time and the delivery date. However, this letter does not indicate that discussions were held with SICOA, since SICOA was not given an opportunity to revise its proposal. The letter merely confirmed that the eventual delivery date would be extended in accordance with clause F09 of the RFP. That clause based the delivery schedule on award of the contract within 30 days after the initial closing date and automatically extended the delivery schedule by the number of calendar days after the closing date that the contract was in fact awarded.

The July 6 letter, which Grieshaber also contends was an indication of discussions, concerned the evaluation of preaward samples. The letter confirmed that SICOA's samples had "matte finish" rather than "mirror finish" as required by the specifications.

The samples were submitted pursuant to clause M22, "Pre-Award Sample(s)," which required the submission of samples prior to award. That clause stated in part:

> "The samples referred to in the preceding paragraphs are not bid samples; rather, these samples are for the purpose of establishing the offeror's capability, if awarded a contract, to produce items conforming to the specifications.
>
> . . . . .
>
> "Offerors are cautioned that upon receipt of any award hereunder, they are obliged to deliver supplies which comply with the specifications regardless of whether any sample submitted hereunder deviates in any way from the specification requirements."

As the quoted language indicates, the samples were for the purpose of confirming the offeror's capability to produce conforming items--in other words, to determine the prospective awardee's responsibility. Communications, such as the July 6 letter, confirming the offeror's capability to perform, do not constitute discussions if no firm is given an opportunity to modify its proposal. Con Diesel Mobile Equipment Division, B-201568, Sept. 29, 1982, 82-2 C.P.D. ¶ 294. Also, as clause M22, supra, indicates, the submitted samples had no effect on SICOA's obligation to comply with the specifications.

The May 13 letter to DLA indicated that the steel to be used by SICOA was to be purchased from Carpenter Technology Corporation. Grieshaber contends that this information was necessary to determine the compliance of SICOA's proposal with the requirement that the steel offered, a specialty metal, be of United States origin. We do not agree. As we explained above, there was no requirement that offerors identify suppliers of specialty metals; clause I42 only required offerors to identify the country in which specialty metals were to be melted. The purpose of the letter was to confirm the representation of United States specialty metal in SICOA's offer and did not modify that offer, so it did not amount to discussions. John Fluke Manufacturing Company, Inc., B-195091(1), supra.

Conclusion

For the reasons above, we dismiss the protests in part and deny them in part.

for Milton J. Socolar
Comptroller General
of the United States