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DECISION



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

FILE: B-215885 **DATE:** January 4, 1985
MATTER OF: True Machine Company

DIGEST:

1. Compliance with internal agency policies or procedures concerning the listing of a firm as a mobilization base producer is a matter of executive policy which GAO would normally regard as an internal matter to be resolved within the agency rather than through the bid protest process.
2. Since the agency's findings concerning the production capability of the firm selected for award were determinative of the firm's listing as a mobilization base producer and thus of its eligibility for award under the solicitation, the agency's decision to list the firm as a mobilization base producer was tantamount to an affirmative determination of responsibility which GAO will not review in the absence of a showing of fraud or bad faith on the part of contracting officials.
3. An award made on the basis of initial proposals was not improper where the solicitation included a notice that award might be made on the basis of initial proposals, without discussions, there has been no showing that discussions occurred, and the number of proposals and the range of prices support the conclusion that there was adequate competition resulting in a reasonable price.
4. Although the concept of responsiveness generally does not apply to negotiated procurements as it applies in formally advertised procurements, certain solicitation requirements may be sufficiently material such that a proposal which fails to include them is technically unacceptable.

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5. DD Form 1519, by which possible producers of essential military items participate in the Department of Defense Industrial Preparedness Production Planning Program, essentially sets forth the capability of a firm to produce a planned item during a certain time frame during a national emergency. The agreement is not binding on either the planned producer or the government and cannot be considered as relevant to the commitment of a firm to perform under a particular contract.

True Machine Co. protests the award of a contract to Solar Flame, Inc., under request for proposals No. DAAA09-84-R-0125, issued by the United States Army Armament, Munitions and Chemical Command (AMC) for F/M207E2 (TOW 2) missile bodies. The procurement was restricted to listed mobilization base producers. True Machine contends that the award to Solar Flame was improper, alleging that AMC failed to conduct negotiations with True Machine and instead made award on the basis of initial proposals, that Solar Flame lacked both the necessary prerequisites for listing as a mobilization base producer and the capability adequately to perform the contract, and that Solar Flame's offer was nonresponsive to the delivery schedule set forth in the solicitation. We deny the protest in part and dismiss it in part.

The procurement was negotiated pursuant to the authority in 10 U.S.C. § 2304(a)(16) (1982) permitting negotiation where necessary to ensure the availability of sources of supply of property or services in case of a national emergency. The procurement was restricted to firms which were listed as a "MOBILIZATION BASE PRODUCER."

We have been advised by the agency that mobilization base producers are "Planned Producers" participating in the Department of Defense (DOD) Industrial Preparedness Production Planning Program. See DOD Federal Acquisition Regulation (FAR) Supplement ¶ 8.070. This program encompasses

planning by DOD with possible producers of essential military items in order to assure the capability for the sustained production of such items to meet the needs of United States and Allied Forces during an emergency. The planning is accomplished via completion of a DD Form 1519, "DOD INDUSTRIAL PREPAREDNESS PROGRAM PRODUCTION PLANNING SCHEDULE." As set forth in the DOD "INDUSTRIAL PREPAREDNESS PLANNING MANUAL," DOD Instruction No. 4005.3 (July 24, 1972), pp. 22-24, government production planning officials survey the facilities in question and negotiate with plant management the production planning schedule set forth in DD Form 1519. The resulting agreement essentially details the capability of the planned producer to produce the planned item in a certain time frame.

AMC received four offers in response to the solicitation. Solar Flame submitted the apparent low offer and included a completed DD Form 1519 signed by production planning officials prior to issuance of the solicitation. Upon learning of the resulting award to Solar Flame, True Machine filed this protest with our Office.

True Machine alleges that Solar Flame did not meet the prerequisites for listing as a mobilization base producer of the TOW 2 body. It contends that these prerequisites include not only execution of a DD Form 1519, but also approval of gauge designs and inspection plans, proper tooling, and a satisfactory record of producing the planned item. Thus, argues True Machine, the award constituted a misapplication of definitive responsibility criteria. In any case, contends True Machine, Solar Flame lacked the actual capability to meet the required delivery schedule.

The agency, however, denies that award to Solar Flame was improper. It maintains that Solar Flame became an approved and listed mobilization base producer when, several months prior to issuance of the solicitation, Solar Flame's completed DD Form 1519 was accepted and approved by agency officials.

We are unaware of any regulations or directives requiring more than completion and approval of a DD Form

1519 before a firm can be considered a mobilization base producer. We note that both DOD FAR Supplement § 8.070(b) and the DOD INDUSTRIAL PREPAREDNESS PLANNING MANUAL, p.viii, define the equivalent term of "Planned Producer" as an industrial firm which has indicated its willingness to produce specified military items in a national emergency by completing a DD Form 1519. In any case, even if internal DOD policy or procedures were to require the prerequisites identified by True Machine, compliance would be a matter of executive policy which we would normally regard as an internal matter to be resolved within DOD rather than through the bid protest process. SAFE Export Corp., B-209391, B-209392, Dec. 20, 1982, 82-2 C.P.D. ¶ 554; Timeplex, Inc., et al., B-197346, et al., April 13, 1981, 81-1 C.P.D. ¶ 280.

Moreover, since the agency's findings concerning Solar Flame's production capability, as set forth in DD Form 1519, were determinative of its listing as a mobilization base producer of the TOW 2 body and thus of its eligibility for award under this solicitation, we believe that the agency's approval of Solar Flame's DD Form 1519 and listing as a mobilization base producer was tantamount to an affirmative determination of Solar Flame's responsibility. See Freedom Industries, Inc., B-212371, Nov. 28, 1983, 83-2 C.P.D. ¶ 617.

Affirmative determinations of responsibility involve subjective business judgments by procuring officials as to a firm's capability and are not readily susceptible to reasoned review. Further, the procuring agency which exercises this discretion must suffer any difficulties experienced by reason of the contractor's nonresponsibility. Accordingly, we will not review an affirmative determination of responsibility in the absence of a showing of fraud or bad faith on the part of procuring officials or the failure to apply a definitive criterion of responsibility. See S.A.F.E. Export Corp., B-213027, June 27, 1984, 84-1 C.P.D. ¶ 675; Freedom Industries, Inc., B-212371, supra, 83-2 C.P.D. ¶ 617 at 11.

True Machine has not shown fraud or bad faith on the part of procuring officials in listing Solar Flame as a mobilization base producer of TOW 2 bodies. Although it

has alleged that accepting Solar Flame as a mobilization base producer for this procurement constituted a misapplication of definitive responsibility criteria, the determination of Solar Flame's production capability and the consequent listing of Solar Flame as a mobilization base producer do not involve the specific and objective standards of responsibility which we have found to be definitive responsibility criteria. See Freedom Industries, Inc., B-212371, supra, 83-2 C.P.D. ¶ 617 at 11; cf. Defense Industries Inc., B-202094.3, Nov. 30, 1981, 81-2 C.P.D. ¶ 429. Accordingly, we will not review True Machine's challenge to the listing of Solar Flame as a mobilization base producer.

Since True Machine has likewise failed to show fraud or bad faith or the misapplication of definitive responsibility criteria in regards to the determination of Solar Flame's ability to meet the solicitation requirements, i.e. its responsibility, neither shall we review True Machine's contention that Solar Flame is unable to meet the required delivery schedule.

True Machine also complains that DLA "made no effort to negotiate any part of the solicitation with any bidder other than Solar Flame," but instead made award on the basis of initial proposals.

Award, however, may be made on the basis of initial proposals without discussions, where it can be clearly demonstrated from the existence of adequate competition that acceptance of the most favorable initial proposal without discussions would result in a fair and reasonable price, provided that the solicitation advises offerors of the possibility that award might be made without discussions and provided that award is in fact made without discussions. Discussions occur if an offeror is afforded an opportunity to revise or modify its proposal or when the information requested and provided is essential for determining the acceptability of the proposal. By contrast, clarifications are inquiries to eliminate minor uncertainties or irregularities. While an agency may request "clarifications" when it conducts "discussions" it must afford all offerors in the competitive range the

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opportunity to submit revised proposals. See Emerson Electric Co., B-213382, Feb. 23, 1984, 84-1 C.P.D. ¶ 233; see also Alchemy, Inc., B-207338, June 8, 1983, 83-1 C.P.D. ¶ 621 (discussions versus clarifications).

Here, the solicitation included a notice that award might be made without discussions and on the basis of initial proposals. True Machine has not shown that contracting officials engaged in any discussions with any offeror concerning this procurement prior to award. Contracting officials consider the award to Solar Flame to have resulted from adequate competition. Since the agency received four offers, ranging from Solar Flame's low offer of \$16.79 per unit for the base quantity to True Machine's offer of \$19.83 per unit and the third and fourth low offers of \$31.40 and \$109.59 per unit respectively, we see no reason to question the adequacy of the competition and the reasonableness of the price.

Finally, True Machine alleges that Solar Flame's offer was nonresponsive to the required delivery schedule. In particular, True Machine points out that the solicitation included a requirement for the delivery of 1844 TOW 2 bodies within 120 days after contract award and 1826 units per month thereafter, as well as a warning that the "delivery schedules are firm." True Machine contrasts these requirements with the figures on Solar Flame's "ALLOCATED PRODUCTION" as set forth under item 11a of the DD Form 1519 submitted by Solar Flame with its offer. These indicate an allocated production of only 200 units per month by the fourth month, 600 per month by the fifth month, 1200 by the sixth month, and 2000 per month by the seventh month.

We initially note that although the concept of responsiveness generally does not apply to negotiated procurements as it applies in formally advertised procurements, see Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 C.P.D. ¶ 264, certain solicitation requirements may be sufficiently material such that a proposal which fails to include them is technically unacceptable, see B&D Supply Company of Arizona, Inc., B-210023, July 1, 1983, 83-2 C.P.D. ¶ 50.

We need not, however, decide whether the delivery schedule in the solicitation is such a material requirement, since there is no indication that Solar Flame is not offering to meet the delivery schedule. As we indicated above, DD Form 1519 essentially concerns the capability of a firm to produce a planned item during a certain time frame during an emergency. The agreement is not binding on either the planned producer or the government, as is expressly recognized in DD Form 1519, see Fermont Division of Dynamics Corporation of America, B-186154, Aug. 31, 1976, 76-2 C.P.D. ¶ 207, and cannot be considered as relevant to the commitment of a firm to perform under a particular contract.

Moreover, True Machine appears to misinterpret the significance of item 11a itself. The allocated production specified thereunder in fact reflects only the contractor's "delivery capability to meet Required Delivery (Item 10)" rather than the firm's overall capability to produce the item. DOD INDUSTRIAL PREPAREDNESS PLANNING MANUAL, pp. 80-81. Thus, the allocated production indicated in item 11a conforms to the same delivery schedule as set forth in item 10. By contrast, item 15 of Solar Flame's DD Form 1519 indicates that the firm's maximum attainable production with existing facilities and from a cold base is 3000 units per month by the fourth month after mobilization and 6000 units per month thereafter, more than enough to meet the required delivery schedule.

Accordingly, the protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States