

DECISION



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

30962

FILE: B-216286

DATE: April 12, 1985

MATTER OF: D.D.S. Pac

DIGEST:

1. Allegation that agency's estimated quantities are erroneous is denied since protester has not shown that agency's estimates were not based on the best information available, otherwise misrepresent the agency's needs, or result from fraud or bad faith.
2. Protest alleging that awardee's offer is unbalanced and will not result in lowest cost to the government if services, specifically eliminated from RFP, are reinstated, is denied. Record shows that eliminated services have not been required by the agency and, under these circumstances, there is no basis to conclude that awardee's offer will not result in lowest cost to the government.
3. GAO does not review an affirmative determination of responsibility unless the protester shows fraud or bad faith on the part of procurement officials or the solicitation contains definitive responsibility criteria that allegedly have not been applied. To show fraud or bad faith, the protester must submit virtually irrefutable proof that procurement officials had a malicious and specific intent to harm the protester.
4. There is nothing illegal in the government's acceptance of a below-cost offer where the offeror is found responsible.

D.D.S. Pac protests the award of a contract to Thru-Container International, Inc., under request for proposals (RFP) No. N68836-84-R-0049 issued by the Department of the Navy. The contract awarded is a firm, fixed-price requirements contract for the

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preparation of household goods of military personnel for storage and/or shipment to and from the United States military installation located at Guantanamo Bay, Cuba (GTMO). D.D.S. Pac contends that the estimated quantities set forth in the RFP are in error and that Thru-Container's proposal is unbalanced. In addition, D.D.S. Pac alleges that Thru-Container is not a responsible offeror.

We deny the protest in part and dismiss it in part.

The RFP for these services was initially issued in September 1983. That RFP provided for the shipment of household goods by both direct shipment by the military (DPM) and international through government bill of lading (ITBGL). After a review of the proposals received in response to this solicitation, the Navy determined that the ITBGL method of shipment should be eliminated from the RFP. Since this constituted a significant and material change, the RFP was canceled by the contracting officer.

On March 29, 1984, RFP No. N68836-84-R-0049 was issued as a replacement. This RFP solicited offers for the same requirement, but reflected the fact that only the DPM method of shipment would be required. Four proposals were received and, due to the price disparity between the offers, the Navy determined that a review of the RFP's quantity estimates was necessary. The Navy requested GTMO to verify the estimates and, as a result of further discussions with GTMO, amendment No. 002 was issued revising the estimated quantities. Two subsequent amendments were issued which changed the initial period of contract performance from January 1, 1984 to October 1, 1984 - December 31, 1984, revised the estimates for the new timeframe and established a new closing date. Award was made to Thru-Container on August 20, 1984.

D.D.S. Pac alleges that the RFP, as amended, still contains material errors in the estimated quantities. D.D.S. Pac argues that a line item analysis of the proposals would show that the estimates are erroneous. Also, D.D.S. Pac alleges that Thru-Container's offer is unbalanced and that the Navy will lose the benefit of Thru-Container's low prices if ITBGL services are reinstated during contract performance. D.D.S. Pac argues that the Navy has not conclusively stated that the ITBGL method

of shipment would not be required at some future time and that including these services would permit Thru-Container to take advantage of its unbalanced proposal.

Finally, D.D.S. Pac argues that Thru-Container should have been found nonresponsible. D.D.S. Pac contends that a reasonable inquiry into Thru-Container's financial status would have shown that the company had serious financial problems and that the Navy's failure to conduct such an inquiry is tantamount to bad faith in the present case. In addition, D.D.S. Pac argues that Thru-Container's prices were so far under cost for certain items that the firm's ability to perform the contract is undermined.

When an agency solicits offers for a requirements contract on the basis of estimated quantities, the agency must base its estimates on the best information available. There is no requirement, however, that the estimates be absolutely correct. Rather, the estimated quantities must be reasonably accurate representations of anticipated actual needs. Ace Van & Storage Co.; Windward Moving & Storage Co., B-213885, B-213885.2, B-214208, July 27, 1984, 84-2 CPD ¶ 120. The mere presence of a risk factor in government estimates does not render the estimates inaccurate, since there is no requirement that the estimates be so precise that they eliminate the possibility that the contractor will encounter unforeseen conditions or be required to perform slightly more or less work than specified. Hero, Inc., 63 Comp. Gen. 117 (1983), 83-2 CPD ¶ 687.

A protester challenging an agency's estimates bears the burden of proving that those estimates are not based on the best information available, otherwise misrepresent the agency's needs, or result from fraud or bad faith. JETS Services Inc., B-190855, Mar. 31, 1978, 78-1 CPD ¶ 259. Here, the record shows that the final estimated annual quantities in the RFP were based upon the average annual shipments in prior years plus an estimated increase due to population growth at GTMO. Although D.D.S. Pac asserts that these estimates are erroneous, D.D.S. Pac has not demonstrated, in our view, that they were not based upon the best information available or resulted from fraud or bad faith. Accordingly, we conclude that D.D.S. Pac has not met its burden of proof in this regard.

With respect to D.D.S. Pac's allegation that Thru-Container's offer was unbalanced, we note that a numerically unbalanced offer may be accepted; it is only a materially unbalanced offer which must be rejected. A numerically unbalanced offer will be materially unbalanced where there is reasonable doubt that its acceptance would result in the lowest cost to the government. Gyro Systems, B-216447, Sept. 27, 1984, 84-2 CPD ¶ 364. D.D.S. Pac argues that the Navy will not receive the benefit of Thru-Container's low prices if ITGBL services are requested. However, the RFP does not allow the ITGBL method of shipment nor has the contract been amended to permit Thru-Container to utilize this method of shipment. Under these circumstances, we find no basis to conclude that Thru-Container's offer would not result in the lowest cost to the government. To the extent D.D.S. Pac is protesting a potential future change to the contract, such an allegation is mere speculation and will not be considered by our Office. American Dredging Company, B-212212, July 26, 1983, 83-2 CPD ¶ 130.

Concerning D.D.S. Pac's allegations regarding Thru-Container's financial responsibility and capacity to perform, our Office has long held that a procuring agency has broad discretion in making responsibility determinations. The determination of a prospective contractor's ability to perform necessarily involves a subjective business judgment for procuring officials and, thus, is not readily susceptible to our review. J. F. Barton Contracting Co., B-210663, Feb. 22, 1983, 83-1 CPD ¶ 177. We therefore will not review affirmative responsibility determinations unless there is a showing of possible fraud or bad faith on the part of procurement officials, or the solicitation contains definitive responsibility criteria that allegedly have not been applied. Sunair Electronics, Inc., B-208385, Aug. 18, 1982, 82-2 CPD ¶ 154.

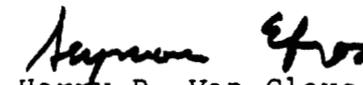
The Navy states that a review of Thru-Container's capabilities was made by the contracting officer and, since an affiliate of Thru-Container previously held this contract and performed satisfactorily, the firm was considered responsible. D.D.S. Pac argues that the Navy should have conducted an inquiry into Thru-Container's financial status and, if it had, the Navy would have discovered the financial problems at Thru-Container which have since become evident.

The mere fact, however, that a protester disagrees with a contracting officer's determination of responsibility, or alleges that the contracting officer lacked

sufficient information to determine a bidder responsible, does not show that the contracting officer acted fraudulently or in bad faith. Contracting officials are presumed to act in good faith and, in order to show otherwise, the protester must submit virtually irrefutable proof that they had a malicious and specific intent to harm the protester. Arlandria Construction Co., Inc.--Reconsideration, B-195044, B-195510, July 9, 1980, 80-2 CPD ¶ 21. D.D.S. Pac's protest submissions do not suffice to meet the high standard of proof required to show fraud or bad faith and, since there are no definitive responsibility criteria involved here, we will not consider the protest as it relates to Thru-Container's responsibility.

Finally, we note that D.D.S. Pac's allegation that Thru-Container's prices are so low that the firm will not be able to perform provides no basis upon which to challenge the award. There is nothing illegal in the government's acceptance of a below-cost offer where the offeror is found responsible. Danline Inc., B-215878, July 31, 1984, 84-2 CPD ¶ 145.

The protest is denied in part and dismissed in part.

for 
Harry R. Van Cleve
General Counsel