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DECISION



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

FILE: B-221841 **DATE:** May 20, 1986
MATTER OF: 3M Deutschland GmbH

DIGEST:

1. A protester that would be a potential competitor if the protest were sustained and the requirement resolicited is an interested party although it did not submit a timely offer on the protested solicitation.
2. The General Accounting Office does not review affirmative determinations of responsibility in the absence of a showing of possible fraud or bad faith on the part of contracting officials or that definitive responsibility criteria were not applied.
3. Protester has not established that procuring agency gave advance notice of award to the successful offeror where the only evidence is a purported statement by the offeror, made before completion of proposal evaluation and a preaward survey, that it had received the contract.
4. Protest that successful offeror provided inaccurate estimates of supplies and services to be purchased in the United States provides no basis for questioning an award where the estimates were solely for informational purposes and were not used in evaluation of proposals.
5. Protest that contract for maintenance and repair of office equipment did not include final prices for replacement parts, but provided for definitization of those prices after award, is without merit where the only supplier of the replacement parts refuses to provide a price list to the sole offeror until after contract award.
6. Offerors may submit prices for some but not all items where the solicitation provides that the procuring agency may accept any item or group of items.

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3M Deutschland GmbH protests the award of contracts to Engineering and Professional Services Incorporated (EPS) and Bethge & Strutz GmbH (B&S) under request for proposals (RFP) F61546-85-R-0547, issued by the U.S. Air Force Europe Contracting Center, Wiesbaden, Germany on September 5, 1985. The solicitation contemplated a fixed-price requirements contract for inspection and maintenance of government-owned 3M office machines, including copiers, microfiche reader/printers, and cameras, in the Federal Republic of Germany for a base year and 2 option years. 3M, which has provided these services for the past 21 years, challenges the Air Force's determination that EPS and B&S are responsible firms and that their offers were responsive to the solicitation.

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

The solicitation required offerors to submit unit prices for regular maintenance and repair of 36 types of office equipment, prices for parts replaced during unscheduled repairs (including installation and incidental costs), and a price for unproductive time when equipment is unavailable for scheduled service. The Air Force received proposals from EPS and B&S by the October 10, 1985 closing date for receipt of initial proposals. The Air Force also received a proposal from 3M on October 11, but considered the proposal to be late and did not evaluate it. The Air Force solicited best and final offers from B&S and EPS for the maintenance of plain paper copiers, the only item for which both firms submitted offers, and awarded a contract for this item to B&S, the low offeror, on December 31. The Air Force held discussions with EPS, the only offeror for the remainder of the items, and awarded a contract for those items to EPS on December 27.

Interested Party Status

EPS argues that 3M is not an interested party in this protest since its proposal was late and the Air Force did not evaluate it.

An interested party is defined in the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(2) (Supp. II 1984), as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract." This definition is reflected in our Bid Protest Regulations. 4 C.F.R. § 21.0(a) (1985). In general, we do not consider a party's interest as a

protester to be sufficient where that party would not be eligible for an award if the protested issues were resolved in its favor. Communique, Inc., B-219391, Sept. 5, 1985, 85-2 CPD ¶ 271. In this case, if 3M were to prevail on its challenge to the award of the contracts to EPS and B&S, resulting in termination of both contracts, the agency would presumably resolicit to meet its needs. 3M would then be a prospective offeror on the resolicitation and would obtain a direct benefit as a potential competitor. Engine and Equipment Co., B-199480, May 7, 1981, 81-1 CPD ¶ 359. Therefore, 3M is an interested party in this protest.

Responsibility of the Offerors

The majority of 3M's protest issues relate to the Air Force's determination that 3M and B&S are responsible firms, capable of meeting the contractual obligations. 3M alleges that EPS is not a registered firm under German law; that EPS does not have the required license from the German postal authorities to perform maintenance or repair on facsimile transmission equipment; that B&S does not have representatives in some parts of Germany, particularly Berlin; that EPS and its subcontractor do not have adequately trained personnel; that Dun and Bradstreet reports on financial capability have not been furnished by EPS or B&S; and that EPS provided false information concerning its financial capability and personnel qualifications in its proposal.

Affirmative determinations of responsibility involve business judgments by procuring officials as to a firm's capability and are not readily susceptible to reasoned review. Further, the procuring agency that 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 unless the protester shows possible fraud or bad faith on the part of contracting officials or that definitive responsibility criteria included in the solicitation criteria were not met. 4 C.F.R. 21.3(f)(5); True Machine Co., B-215885, Jan. 4, 1985, 85-1 CPD ¶ 18. The allegations by 3M concerning the awardee's responsibility do not entail possible fraud or bad faith by the Air Force or definitive responsibility criteria, and we will not, therefore, consider them. See, e.g., Evergreen Helicopters, Inc., B-215375, July 18, 1984, 84-2 CPD ¶ 62; Envirotronics, Inc., B-215622, July 3, 1984, 84-2 CPD ¶ 18.

Estimated Domestic Procedures

3M questions the accuracy of EPS' response to a provision in the solicitation requesting information on expenditures to be made in the United States. Offerors were asked to estimate, as a percentage of the amount of each invoice, the amount of supplies and the amount of services to be purchased in the United States for use under the contract. The information is used in reporting, pursuant to the Department of Defense Balance of Payment Program, the amount of acquisitions of United States end products and services. The contractor must provide the same estimates on each delivery order and invoice. See Department of Defense Federal Acquisition Regulation Supplement, 48 C.F.R. §§ 225.370, 225.225-7004 (1984).

The Air Force requested these estimates solely for informational purposes and did not evaluate them for purposes of contract award. Accordingly, if EPS' estimates are inaccurate, this would not be grounds for rejection of the firm's proposal. Deliberate misrepresentation of estimated purchases in the United States arguably could be considered by the contracting officer in his responsibility determination. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-1(d) (1984). However, as discussed above, possible fraud by the Air Force or definitive responsibility criteria must be present to protest an affirmative responsibility determination. Neither is present here, and we deny the protest on this basis.

Pricing of Replacement Parts

In its best and final offer, EPS did not provide the latest price list for parts of 3M office equipment to be serviced under the contract. Previous price lists obtained from 3M were included in earlier EPS proposals, but 3M declined to give EPS the latest prices. 3M states that it will sell parts at commercial prices to any firm meeting certain financial criteria, but that it refuses to divulge current prices to EPS until after award of the contract in order to avoid "preaward price fixing."

3M now contends that the inability of EPS to provide the latest 3M parts prices violates the RFP requirement for cost or pricing data. 3M claims that it was improper for the Air Force to issue a contract without finally pricing 3M replacement parts.

The solicitation required offerors to furnish sufficient cost or pricing information to enable the contracting officer to analyze proposed prices and determine that they were fair and reasonable. EPS was unable to propose prices for 3M replacement parts until it obtained price lists after award. The requirement for information to support those prices would, therefore, not be applicable until the prices themselves are proposed, and we cannot conclude that EPS violated it.

In view of 3M's policy of not revealing prices to competing firms until after award, the Air Force issued a letter contract to EPS with the prices for replacement parts to be negotiated (definitized) by February 28. A letter contract is a written preliminary contractual instrument, or part of an instrument in this case, that authorizes a contractor to begin performance. FAR, 48 C.F.R. § 16.603-2. It may be used when the government's interests demand that the contractor be given a binding commitment so that work can start immediately, but it is not possible to negotiate a definitive contract in sufficient time to meet the requirement. See Roy F. Weston, Inc., B-197866 et al., May 14, 1980, 80-1 CPD ¶ 340; Hy-Gain Electronics Corp. et al., B-180740, Dec. 11, 1974, 74-2 CPD ¶ 324. Such a contract must contain a negotiated definitization schedule, including a date for submission of the contractor's price proposal and a target date for definitization within 180 days after the date of the contract. If it is not possible to negotiate a definite contract, the contractor is required to proceed with the work, and the contracting officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee subject to appeal as provided in the Disputes clause of the contract.

Since the only offeror for much of the work could not obtain prices for 3M replacement parts until after award, the Air Force determined that the interest of the government demanded that it award a letter contract with a provision for later pricing of replacement parts. We see no reason to question that determination, given 3M's temporary refusal to supply prices for replacement parts and the fact that the previous contract for maintenance services had expired on September 30, 1985. We deny the protest on this basis.

Miscellaneous Issues

3M alleges that the Air Force demonstrated bad faith by giving EPS advance notice of contract award. This allegation is based on a statement by an American firm, which 3M apparently employed to investigate EPS, that on November 11, 1985 EPS stated that it had a contract to maintain 3M equipment for the United States government in Germany. Even assuming that EPS actually made such a statement, 3M presents no evidence that the Air Force told EPS that it would receive the contract. Nor does the protester suggest how the Air Force might have acted in bad faith, i.e., with malicious and specific intent to harm 3M. Moreover, as of November 11, 1985, the Air Force had not completed evaluation of the EPS proposal or conducted a preaward survey. We regard 3M's allegation as mere speculation, and we also deny the protest on this basis. See Newport Offshore Ltd., B-219031.3, July 12, 1985, 85-2 CPD ¶ 48.

3M also contends that the award of more than one contract was not in accord with the solicitation and that offerors were required to include all items in their proposals. We find, however, that the solicitation incorporated by reference a clause, "Contract Award (Apr. 1985)," 48 C.F.R. § 52.215-16(d), providing that the government may accept any item or group of items unless the offeror qualifies the offer by specific limitations. Since the Air Force could award contracts for less than all of the items specified, it was not improper for B&S to submit an offer for only some of the items. See 41 Comp. Gen. 721 (1962); Excavation Construction, Inc., B-180553, Mar. 31, 1974, 74-1 CPD ¶ 292.

3M's final contention concerns the fact that the EPS contract provides for maintenance of overhead projectors to be performed on a delivery order basis at a fixed hourly rate plus replacement parts at cost. The RFP initially provided for overhead projectors to be maintained on a scheduled basis, and offerors proposed a fixed annual price per unit. During discussions, the Air Force determined that maintenance on an "on call" basis would better meet the government's needs. 3M asserts that the contract price is a ceiling that can be exceeded by maintenance of projectors since there is no cap on the amount of service that may be required. The contract is not for a total fixed-price, but generally provides for fixed unit prices for regularly scheduled and unscheduled maintenance. Thus, the contract price is an estimate and not a ceiling, and it will vary

depending upon the number of units actually maintained and the amount of maintenance and repair actually conducted. Thus, we deny this basis of 3M's protest.

The protest is denied in part and dismissed in part.

for *Leynon E. Foss*
Harry R. Van Cleve
General Counsel