

DECISION



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

FILE: B-222617 DATE: June 5, 1986
MATTER OF: Enidine, Inc.

DIGEST:

1. GAO will not review an agency's affirmative determination of responsibility except in limited circumstances.
2. Protest that low offer may be mistaken is dismissed, since only the contracting parties--the government and the prospective awardee--are in a position to assert rights and bring forth the necessary evidence to resolve mistake questions.
3. There is no requirement that an agency offset foreign government subsidies in evaluating proposals other than through application of the Buy American Act evaluation differential to the price of the foreign items.

Enidine, Inc., protests award of a contract to Urban Industries, Ltd., under Department of the Army solicitation No. DAAE07-85-R-A677 for shock absorbers. Enidine contends that Urban Industries, an Israeli company, will be incapable of performing the contract and submitted an offer so low that either the offer must be mistaken or the price must be subsidized by the government of Israel.

We dismiss the protest.

The ability to perform pertains to a firm's responsibility, Bay Decking Co., Inc., B-216248, Jan. 22, 1985, 85-1 C.P.D. ¶ 77, and the contracting officer must determine that Urban Industries is responsible before making the award. See Freund Precision, Inc., B-216620, Oct. 23, 1984, 84-2 C.P.D. ¶ 456. Because responsibility determinations are inherently judgmental, contracting agencies are afforded wide discretion in the area, and this Office will not review an agency's affirmative determination of responsibility absent fraud or bad faith or a failure to apply definitive responsibility criteria.

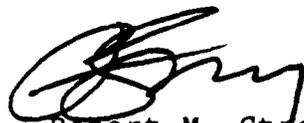
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4 C.F.R. § 21.3(f)(5) (1985). Since neither situation is alleged here, we will not review this aspect of Enidine's protest.

We also will not consider Enidine's assertion that Urban Industries must have made a mistake in its offer. Only the contracting parties--the government and the firm in line for award--are in a position to assert rights and bring forth the necessary evidence to resolve mistake questions. Libby Corp., B-218367.2, Apr. 10, 1985, 85-1 C.P.D. ¶ 412. We also point out in this regard that even if Urban Industries' offer is less than its cost to furnish the supplies, there is nothing improper in the government's acceptance of a below-cost offer from a firm the agency judges is able to perform at the contract price. See JAMATS, Inc., B-220839, Nov. 1, 1985, 85-2 C.P.D. ¶ 508. The regulations require only that the contracting officer ensure that losses due to below-cost awards are not recovered. Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.501-2(a) (1984).

Finally, Enidine offers no evidence to support its concern that the government of Israel may be subsidizing Urban Industries' offer. In any case, United States policy with regard to offers of foreign items is reflected in the implementing regulations of the Buy American Act, 41 U.S.C. § 10a (1982), which seek to equalize the competitive advantage that a foreign firm might have by providing a preference for domestic items through the use of an evaluation differential added to the price of the foreign item. FAR, 48 C.F.R. part 25; see Tritan Corp., B-218306, May 24, 1985, 85-1 C.P.D. ¶ 601. Otherwise, there is no requirement that an agency offset foreign government subsidies in evaluating proposals, see Cadillac Gage Co., B-209102, July 15, 1983, 83-2 C.P.D. ¶ 96 at 14, since an agency is not required to equalize the competitive advantage a firm might enjoy by virtue of its own particular circumstances so long as the advantage is not the result of preference or unfair action by the United States. McGregor Mfg. Corp., B-217086, Dec. 17, 1984, 84-2 C.P.D. ¶ 678. It is evident from Enidine's protest that the difference between its offer and Urban Industries' is too great for the Buy American Act factor to make any difference in the award decision.

The protest is dismissed.

A handwritten signature in black ink, appearing to read 'R. Strong', written in a cursive style.

Robert M. Strong
Deputy Associate
General Counsel