The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: LSL Industries, Inc.

File: B-222588

Date: July 22, 1986

DIGEST

1. There is no legal basis to object to a below-cost offer. Whether an offeror can meet contract requirements in light of its low price is a matter of responsibility, the affirmative determination of which is not reviewed by GAO except in circumstances not present in this case.

2. Agency need not conduct a preaward survey where the total contract price is less than $100,000 and commercial products are involved.

3. Protest that bid samples should have been required is dismissed as untimely under 4 C.F.R. § 21.2(a)(1) where not filed prior to closing date for receipt of initial proposals and it was clear from solicitation that first article test, not bid samples, was required.

DECISION

LSL Industries, Inc. (LSL), protests award of a contract to Zenex Corporation (Zenex) for urine specimen kits under solicitation No. DLA120-86-R-0650 issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency.

LSL advises that it was awarded a contract for the same item in July 1985 and supplied a plain polybag as a sterile barrier; however, on two subsequent contracts it received, DPSC requested that it use a more expensive sterile barrier, which resulted in a substantially higher price. Therefore, LSL states that it understood the RFP to require the more expensive sterile barrier. LSL argues, on the basis of Zenex's low price, that it will not provide the appropriate barrier. Further, LSL advises that DPSC did not require a preaward sample from Zenex, making it impossible to determine whether Zenex would provide the correct barrier. Additionally, LSL questions why DPSC did not conduct a preaward survey on Zenex, allegedly a new company which has never supplied this product to DPSC.

We dismiss the protest.

The submission of a below-cost offer is not illegal and provides no basis for challenging an award of a firm, fixed-rate contract to a responsible contractor, since such a contract is not subject to adjustment based on the contractor's cost experience during performance and places no obligation on the contracting agency to pay more than the rate at which contract award is made. ABC Appliance Repair Service, B-221850, Feb. 28, 1986, 86-1 C.P.D. ¶ 215. Whether the low offeror can perform at the price offered is a matter of responsibility. The contracting officer makes a determination of the prospective awardee's responsibility before award. Our Office does not review protests against affirmative determinations of responsibility, unless either fraud or bad faith on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. Id. Neither exception applies here.

Regarding DPSC's decision not to request a preaward survey, DPSC reports that the contracting officer reasonably determined that a preaward survey would not be necessary. The Federal Acquisition Regulation, 48 C.F.R. § 9-106.1 (1985), advises that a preaward survey need not be requested if the contemplated contract will have a fixed price of less than $100,000 and will involve commercial products unless circumstances justify its cost. The total contract price was $84,849.60 and DPSC reports that the item being procured is a commercial product. LSL disputes that the item being procured is commercial. However, the RFP specifically states that the contractor shall certify that the product offered is the same product offered for sale in the commercial market place. Therefore, we find no basis to object to DPSC's decision not to request a preaward survey.

LSL's contention that the contracting officer should have required a bid sample is dismissed as untimely since it was not filed prior to the closing date for the receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1) (1986). The solicitation contained a first article test requirement, not a bid sample requirement, and thus was apparent from the face of the solicitation.

The protest is dismissed.

Robert M. Strong
Deputy Associate General Counsel