



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Harnischfeger Corporation  
File: B-224371  
Date: September 12, 1986

### DIGEST

1. Protest alleging that competitor's low bid is neither low nor responsive and should be rejected need not be filed before agency notification of intent to award to competitor since grounds for protest do not arise until protester has learned of agency action or intended action adverse or inimical to protester's position.
2. Allegation that agency improperly evaluated bidder's price for technical manuals as an aggregate price rather than a per manual price is without merit where only reasonable reading of the solicitation is that it required bidders to submit an aggregate price for the total number of technical manuals solicited.
3. Bid accompanied by a letter which expresses nothing more than a desire for changes to the specification and which was not intended for agency's consideration at bid opening does not render bid nonresponsive.
4. Sale by parent company of subsidiary that submitted low bid is not objectionable since buyer of subsidiary purchased entire portion of the business encompassed by the bid.
5. Request that General Accounting Office (GAO) withhold decision pending agency's responsibility determination of low bidder's new ownership is denied where there is no indication that agency will not consider the change in its responsibility determination. Furthermore, contracting officials have broad discretion in this area, and GAO will not object to an affirmative determination of responsibility absent fraud or bad faith on the part of contracting officials or misapplication of definitive responsibility criteria.

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**DECISION**

Harnischfeger Corporation (Harnischfeger) protests the award of a contract to any other bidder under invitation for bids (IFB) No. DLA700-85-B-4627, issued by the Defense Logistics Agency (DLA) for 15-ton, wheel mounted hydraulic cranes. Harnischfeger contends that it submitted the low responsive, responsible bid and is therefore entitled to an award.

We deny the protest.

The IFB was issued on July 30, 1985 and originally specified a bid opening date of August 29, 1985. Bids were solicited for a single-year quantity of 41 cranes and for a total of 142 cranes on a multi-year basis. The IFB indicated that bids would be evaluated and award made on a single-year basis or on a multi-year basis, whichever was determined to be in the government's best interest. Contract Line Item Numbers (CLIN) 0001, 0002, 0003 and 0004 pertained to DLA's single year requirements and CLINS 0005, 0006, 0007 and 0008 specified the multi-year alternative. CLIN 0009 thru 0019 provided for first article testing, as well as technical manuals to be furnished.

Several amendments to the IFB were issued and bid opening was extended until March 27, 1986. DLA received four bids and bids were submitted by all firms for both the single-year and multi-year alternatives. DLA evaluated the bid prices and determined that award on a multi-year basis was clearly more advantageous to the government. The evaluated bid prices submitted by the firms for the multi-year alternative are as follows:

	Total
Koehring Company	\$15,724,037
Grove Manufacturing Company	\$16,116,516
Harnischfeger	\$16,394,081
FMC Corporation	\$20,181,897

Although award has not been made, DLA indicates that it considers Koehring the low, responsive bidder.

Harnischfeger protested to our Office on June 20, 1986, alleging that DLA improperly evaluated Koehring's and Grove's bid prices for CLIN 0014, which set forth the technical manual requirements for the multi-year alternative. Harnischfeger contends that the IFB required bidders to insert a unit price for each technical manual whereas DLA

considered the prices submitted as aggregate prices for the total number of manuals to be provided. Harnischfeger argues that correction of this error results in Harnischfeger's being the low bidder.

In addition, Harnischfeger contends that the bids submitted by both Koehring and Grove are nonresponsive. Harnischfeger argues that the Koehring bid was accompanied by a letter, dated November 5, 1985, which materially conditioned the bid. Harnischfeger contends that Grove failed to include a price for the 36 cranes specified in CLIN 0006 and that this omission requires the rejection of the bid.

#### TIMELINESS

DLA argues that Harnischfeger's protest is untimely. DLA indicates that it obtained a draft copy of Harnischfeger's protest, dated April 22, 1986, which is identical to Harnischfeger's June 20 protest letter to our Office. DLA argues that the "draft" clearly shows that Harnischfeger was aware of its basis for protest at that time and since the protest was not filed within 10 working days of that date, it should not be considered on the merits.

Harnischfeger argues that although it believed that the bids submitted by Koehring and Grove were nonresponsive, it was entitled to wait until DLA made a decision concerning the responsiveness of the bids or took some other action inconsistent with its position before filing its protest. Harnischfeger indicates that it had received no indication from DLA that it was not the low bidder or that the Koehring and Grove bids would not be rejected. Harnischfeger contends that there was no basis for protest until DLA made such a determination and since no award action had been taken by DLA prior to June 20, its protest on that date is timely.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1986), a protest must be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. However, grounds for protest do not arise until the protester has learned of agency action or intended action which is inconsistent with what the protester believes to be correct or is inimical to its interest. R.R. Gregory Corp., B-217251, Apr. 19, 1985, 85-1 CPD ¶ 449; Werner-Herbison-Padgett, B-195956, Jan. 23, 1980, 80-1 CPD ¶ 66. Here, there is nothing in the record which indicates that Harnischfeger was on notice that DLA was evaluating the bid prices for CLIN 0014 in a manner which Harnischfeger considered to be inconsistent with the IFB's requirements or that the Koehring and Grove bids would be considered for

award. Accordingly, since Harnischfeger's protest was filed prior to receipt of any such notification, it is timely and will be considered on the merits.

PRICE EVALUATIONS

CLIN 0014 was set forth in the IFB as follows:

<u>MULTI-YEAR REQUIREMENT</u>	Quantity	Unit	Unit Price	Amount
SEQUENCE A001, TECHNICAL MANUAL REQUIREMENT FOR VEHICLE (SEE AFAD 71-531-(13))				

PROPOSAL NO. 1 - COMMERCIAL TECHNICAL	1	SE*	XXXX	
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OR

PROPOSAL NO. 2 - SPECIFICATION DATA	1	SE*	XXXX	
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OR

PROPOSAL NO. 3 - COMMERCIAL SPECIFICATION DATA	1	SE*	XXXX	
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\*SE (SET) INCLUDES ALL DATA  
REQUIRED BY EACH SEQUENCE.

Harnischfeger argues that although CLIN 0014 shows only a quantity of one set, each bidder's overall price for this item must be determined by multiplying the total number of technical manual sets to be supplied by the price submitted. Harnischfeger contends that a technical manual was required with each crane furnished and notes that the IFB indicated that the funding for each program year will be determined by multiplying the price shown in CLIN 0014 times the number of manuals required for each program year. Harnischfeger argues that award must be based on the quantity to be procured even if the IFB does not specifically provide for the multiplication of the unit price by the overall quantity.

DLA contends that a fair reading of the IFB demonstrates that an aggregate rather than a unit price was called for by CLIN 0014. DLA indicates that the technical manual set referred to in CLIN 0014 was not a single technical manual but rather

included all the manuals required for the total number of cranes to be purchased under the multi-year program. The set was defined by the IFB as all data required by Sequence A0001 of Department of Defense Form 1423 (DD Form 1423), attached to the IFB. Sequence A001 contained five subitems, A0001-AA thru A0001-AE, which DLA contends show that 222 technical manuals were included in the set for the multi-year program. In addition, DLA points out that the unit price column for CLIN 0014 was blocked out by X's which demonstrates that no unit price was to be inserted. With respect to the IFB language cited by Harnischfeger, DLA argues that it pertains solely to the formula by which program funding will be determined and has nothing to do with the price evaluation of the bids.

Furthermore, DLA contends that it is clear that the bid prices submitted by both Koehring and Grove reflect prices for the overall quantity of manuals required. DLA notes that paragraph B01 of the IFB required bidders to submit prices for any additional technical manuals required by the government and Koehring's bid prices of \$25 under that line item and \$8,150 under CLIN 0014 shows that an overall price was included in CLIN 0014. DLA indicates that Harnischfeger is the only bidder that did not price CLIN 0014 in this manner and DLA argues that Harnischfeger's interpretation is not consistent with the terms of the IFB.

An IFB must clearly state the basis on which bids will be evaluated for award, and the agency's evaluation must conform to the stated method. A to Z Typewriter Co., et al., B-215830.2 et al., Feb. 14, 1985, 85-1 CPD ¶ 198. Here, we find that the plain language of the IFB does not support the evaluation method urged by Harnischfeger. We note that CLIN 0009, which specified the technical manual requirement for the single year acquisition, and CLIN 0014 both referred bidders to sequence A0001 of DD Form 1423. Sequence A0001 listed both the single-year and multi-year technical manual requirement. In our view, bidders were instructed to review sequence A0001 in its entirety and based their bid prices for CLIN's 0009 and 0014 on the total number of technical manuals required by the sequence for either the single-year or multi-year requirements. In this respect, we note that the set for which a bid price was solicited specifically included all data required by the sequence. Moreover, we find it significant that the unit price column under CLIN 0014 was blocked out since this directly contradicts Harnischfeger's assertion that a price for only a single technical manual was being solicited.

With respect to Harnischfeger's assertion that language in the IFB supports its interpretation that a single technical manual was to be priced in CLIN 0014, that argument is based on the following IFB statement:

"FOR FUNDING EACH PROGRAM YEAR THE FOLLOWING APPLIES:

THE NUMBER OF MANUALS REQUIRED FOR THE TOTAL SHOWN IN THE AMOUNT COLUMN OF CLIN 0014. THIS FIGURE TIMES THE NUMBER OF MANUALS REQUIRED FOR EACH PROGRAM YEAR WILL BE UTILIZED WHEN FUNDING EACH PROGRAM REQUIREMENT."

We agree with DLA that the above provision has nothing to do with how bidders should price CLIN 0014 and is therefore not controlling. In addition, we find that the language does not support Harnischfeger's argument since the "figure" which will be multiplied by the number of manuals is not necessarily the amount column in CLIN 0014, as suggested by Harnischfeger. To the extent Harnischfeger is arguing that the language should not have been included in the IFB since it could only confuse bidders, this allegation concerns an alleged solicitation impropriety which should have been protested prior to bid opening. See 4 C.F.R. § 21.2(a)(1).

In addition to our finding the agency's interpretation of CLIN 0014 reasonable, we note that, according to Harnischfeger's interpretation, an item which it and FMC totally priced at \$10,000 and \$33,000, respectively, was priced totally by Grove and Koehring at \$1,000,000 and \$1,600,000, respectively.

Accordingly, since we find that CLIN 0014 solicited an aggregate price for the total number of technical manuals required under the multi-year program, DLA properly evaluated the Koehring and Grove bids to be lower than Harnischfeger's.

#### RESPONSIVENESS OF KOEHRING'S BID

Harnischfeger indicates that a representative from the company was present at bid opening and observed that Koehring's bid was accompanied by a letter dated November 5, 1985. That letter was a request from Koehring that DLA make certain changes or clarifications to the solicitation and purchase description. Among other things, the letter recommended new wording for certain parts of the solicitation, suggested that overseas preservation charges be listed as a separate CLIN and also recommended a change to the specification for the cranes, which if approved, would substantially

reduce the horsepower requirements for the cranes. Harnischfeger argues that the letter clearly accompanied Koehring's bid and therefore must be considered as part of the bid. In addition, Harnischfeger contends that the letter took exception to a material provision of the specification and Koehring's bid must therefore be rejected as nonresponsive.

DLA states that it can find no evidence in its files which shows that the Koehring bid was actually accompanied by the November 5 letter. Although DLA does not deny that at the time Harnischfeger reviewed the bid the November 5 letter was with the bid, DLA indicates that it is not clear whether the letter was located in the bid room itself or found in a different location. In this respect, DLA argues that there is evidence which indicates that the letter was actually received by the contracting officer in November or December 1985. DLA's incoming mail log shows that a letter was received from Koehring on November 7 and DLA contends that the letter was perhaps retained and not opened until the bid opening date and thereafter placed with Koehring's bid package. Accordingly, DLA argues, since there is insufficient evidence that the November 5 letter was included with Koehring's bid package, Harnischfeger's objections in this regard are without merit.

In addition, DLA contends that the letter does not qualify the bid since it does not in any way modify Koehring's response to the solicitation. DLA contends that the letter merely makes recommendations and suggestions as to how the solicitation could be made clearer or changed to the government's advantage. DLA notes that many of the suggestions made by Koehring were incorporated into the IFB by amendment No. 0007, dated January 24, 1986 and that this amendment was acknowledged by Koehring with its bid. DLA contends that the acknowledgment is evidence of Koehring's intent to be responsive to the solicitation and that even if the letter is considered, Koehring's bid is still responsive and may be considered for award.

The question of responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items or services in total conformance with the requirements specified in the IFB. Free-Flow Packaging Corp., B-204482, Feb. 23, 1982, 82-1 CPD ¶ 162. Where a bidder qualifies its bid to protect itself or reserves rights which are inconsistent with a material portion of the IFB, the bid must be rejected as nonresponsive. John C. Grimberg Co., Inc.-- Request for Reconsideration, B-218231.2, Apr. 26, 1985, 85-1 CPD ¶ 478. In this regard, a bidder's intention must be

determined from all the bid documents at the time of bid opening and this includes extraneous documents submitted with the bid which must be considered a part of the bid for purposes of determining the bid's responsiveness. Free-Flow Packaging Corp., B-204482, supra; National Oil & Supply Co., Inc., B-198321, June 20, 1980, 80-1 CPD ¶ 437.

At the outset, we note the considerable disagreement among the parties as to whether the November 5 letter accompanied Koehring's bid. We need not resolve this issue, however, since we find that even if the letter was submitted with Koehring's bid, it does not render the bid nonresponsive.<sup>1/</sup>

Our review of the letter shows that Koehring's "requests and suggestions" were nothing more than a desire or wish for changes to the specification. There is no indication that Koehring did not intend to comply with the IFB's requirements if the suggested changes were not made and we think it is clear that Koehring is obligated to comply with all the requirements set forth in the IFB. See Lavelle Aircraft Co., B-218309, June 12, 1985, 85-1 CPD ¶ 678. In this regard, we note that the letter was dated approximately 5 months before bid opening, that the letter had previously been submitted to DLA for consideration and that many of the suggested changes had already been incorporated into the IFB by DLA. Under these circumstances, we believe that the November 5 letter was not intended by Koehring to modify the bid and in view of the precatory nature of the letter, we conclude that DLA properly determined the bid responsive.

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<sup>1/</sup> Koehring denies that the letter was submitted with the bid. While DLA suggests that it actually received the November 5 letter at an earlier date and that the letter was only placed with Koehring's bid after bid opening, the record contains no statement from agency personnel that were present at bid opening to support its explanation and we fail to see why the agency was unable to discover the identity of the individual that allegedly attached the letter to Koehring's bid. Furthermore, we think it incumbent on the agency to institute adequate procedures at bid opening so as to be able to determine with certainty what was received. Although DLA states that there is nothing in its files which indicates that the November 5 letter accompanied Koehring's bid, the record contains no statement from the agency concerning what was actually received at bid opening.

Due to our finding that Koehring was properly evaluated as the low, responsive bidder, we see no reason to consider Harnischfeger's complaint regarding the responsiveness of Grove's second lowest bid.

#### RESPONSIBILITY OF KOEHRING

Finally we note that in its comments to the agency report, Grove indicates that Koehring, which at bid opening was a subsidiary of AMCA International, Ltd., has recently been sold to Northwest Engineering Company. Grove asserts that the transfer may be contrary to the government's interest and, if this current contract is made part of the sale, such a transfer violates the Anti-Assignment Act, 41 U.S.C. § 15 (1982). In addition, Grove asserts that Northwest is facing financial difficulties and requests that we withhold our decision on the protest until a responsibility determination is made.

We point out that the transfer or assignment of rights and obligations arising out of a bid or proposal is permissible where the transfer is to a legal entity which is the complete successor in interest to the bidder or offeror by virtue of merger, corporate reorganization, the sale of an entire business or the sale of an entire portion of a business embraced by the bid or proposal. Ionics Inc., B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290. Grove's submission indicates that AMCA sold its Koehring crane and excavator division to Northwest in its entirety, and under these circumstances the policy underlying the anti-assignment statute is not offended.

With respect to DLA's responsibility determination, DLA should ensure that any preaward surveys are conducted with respect to the appropriate party. Contracts shall be awarded to responsible contractors only and the contracting officer must make an affirmative determination of responsibility before making an award. Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103 (1985). By awarding any contract, the contracting officer necessarily finds a firm to be a responsible prospective contractor. Sylvan Service Corp., B-219077, June 17 1985, 85-1 CPD ¶ 694. Contracting officials have broad discretion in this area and our Office will not object to an affirmative determination of responsibility absent fraud or bad faith on the part of contracting officials or that definitive responsibility criteria contained in the solicitation have not been applied. Newport Offshore Ltd., B-219031 et al., June 13, 1985, 85-1 CPD ¶ 683. There is no indication that DLA will not consider the change in ownership in its responsibility determination and

since there are no allegations of fraud or bad faith, we see no basis to consider this allegation or withhold our decision pending the agency's determination.

The protest is denied.

*for Seymour Efron*  
Harry R. Van Cleve  
General Counsel