



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Teledyne CME
File: B-223609
Date: September 23, 1986

DIGEST

1. Protest against alleged apparent solicitation defect--agency inclusion of allegedly unqualified producer as approved source--is untimely when filed after closing date for receipt of initial proposals.
2. Allegation that contracting officer's affirmative determination of awardee's responsibility was made in bad faith because contracting officer failed to consider awardee's past history of late delivery as a subcontractor is without merit where record shows that contracting officer considered awardee's prior performance history; to establish bad faith, protester must submit virtually irrefutable proof that procurement officials had specific and malicious intent to harm protester.

DECISION

Teledyne CME protests the award of a contract for Solid State Acoustical Memory Systems (SSAMs) for B-52 aircraft to Watkins-Johnson Co. under request for proposals (RFP) No. F09603-86-R-3810 issued by the Air Force. Teledyne asserts that Watkins-Johnson was improperly certified as an approved source for the SSAM because Watkins-Johnson's product does not meet the RFP specifications, and that the contracting officer made a bad faith determination that Watkins-Johnson was responsible.

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

The RFP was issued on April 30, 1986, with a May 30 closing date for receipt of initial proposals. The RFP indicated that Watkins-Johnson and Teledyne were the only approved sources for the SSAM, and referenced these two manufacturers' part numbers. On June 30, the Air Force awarded the contract to Watkins-Johnson on the basis of low price, and on the same date Teledyne protested to the Air Force. On July 11, before the Air Force resolved the protest, Teledyne protested the same issues to our Office.

Prior to the issuance of the RFP, the Air Force had determined that Watkins-Johnson's SSAM met the Air Force specifications based on the evaluation of the performance of a different, but interchangeable, SSAM unit, which Watkins-Johnson was producing as a subcontractor for ITT Avionics under another Air Force contract. Teledyne contends that compliance with the ITT specification does not guarantee compliance with the Air Force specifications in this RFP, and, therefore, Watkins-Johnson should not have been determined to be an approved source for the SSAM at issue. The Air Force states that, while the two specifications are not identical, Watkins-Johnson's product performance under the ITT specification was used as a basis for ascertaining compliance with the appropriate Air Force specification. That is, the Air Force did not qualify the Watkins-Johnson SSAM because it met the slightly different ITT specifications, but rather evaluated the Watkins-Johnson SSAM in terms of the Air Force specification, using the information which had been provided to establish compliance with the ITT specification.

The Air Force asserts that this aspect of Teledyne CME's protest is untimely. We agree. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), protests against apparent solicitation improprieties must be filed prior to the closing date for receipt of initial proposals. Here, the RFP clearly designated Watkins-Johnson as an approved source, listing the specific Watkins-Johnson SSAM part number. Accordingly, Teledyne's protest of Watkins-Johnson as an approved source was required to be filed prior to the May 30 closing date, and was untimely filed with the agency after award on June 30. Shaw Aero Development, Inc., B-221980, Apr. 11, 1986, 86-1 C.P.D. ¶ 357. Accordingly, Teledyne's subsequent protest to our Office is also untimely. 4 C.F.R. § 21.2(a)(3).

While Teledyne asserts that the Air Force report provides new information concerning this basis for its protest, which Teledyne characterizes as a protest that Watkins-Johnson was evaluated on an unequal basis, we note that Teledyne's original protest states the substance of its argument concerning the alleged deficiencies in Watkins-Johnson's SSAM specifications, and Teledyne indicates that it was aware of Watkins-Johnson's SSAM specifications because of Watkins-Johnson's prior production of the item as a subcontractor for ITT. Thus, Teledyne's original protest makes it clear that it had all the information necessary to protest the inclusion of

Watkins-Johnson as an approved source at the time that the RFP was issued. Therefore, we dismiss this aspect of the protest as untimely.

Teledyne also asserts that the Air Force's affirmative determination of Watkins-Johnson's responsibility was made in bad faith because the Air Force disregarded Watkins-Johnson's noncompliance with the specification and Watkins-Johnson's history of late deliveries under its contract with ITT. Teledyne points to the Air Force report which states that "no information is available to support a determination that Watkins-Johnson cannot deliver the units as required by the contract" as evidence that the determination was made in bad faith. First, with respect to the alleged noncompliance with the specification, this is merely a restatement of Teledyne's prior argument concerning the approved source determination, and, as such, it concerns technical acceptability of Watkins-Johnson's product, not Watkins-Johnson's responsibility. As indicated above, we find that this issue was untimely protested. As for Watkins-Johnson alleged late deliveries under its ITT contract, the record shows that the contracting officer contacted ITT, and was advised that Watkins-Johnson was performing and delivering the SSAM in a satisfactory manner.

In any event, in order to show that a responsibility determination was made in bad faith, the protester has a heavy burden of proof; contracting officials are presumed to act in good faith and in order to show otherwise the protester must demonstrate by virtually irrefutable proof that they had a specific and malicious intent to injure the protester. J.F. Barton Contracting Co., B-210663, Feb. 22, 1983, 83-1 C.P.D. ¶ 177. Here, the record reflects that the contracting officer evaluated Watkins-Johnson's past performance and concluded that it had the capability to perform the contract. The mere fact that a protester disagrees with a contracting officer's determination of responsibility, or contends that the contracting officer lacked sufficient information to determine an offeror responsible does not suffice to show that the contracting officer acted in bad faith. Moreover, the protester has neither alleged nor demonstrated any specific or malicious intent on the agency's part, which is required to support the claim of bad faith. Nations, Inc., B-220935.2, Feb. 26, 1986, 86-1 C.P.D. ¶ 203. Under these circumstances, we have no basis to object to the Air Force's affirmative determination that Watkins-Johnson is responsible.

The protest is dismissed in part and denied in part.

In view of our disposition of the protest, we also deny Teledyne's claim for proposal preparation costs and attorney's fees.

Ronald Berger

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Harry R. Van Cleve
General Counsel