



The Comptroller General
of the United States

Washington, D.C. 20548

amde

Decision

Matter of: State Machine Products
File: B-224260
Date: February 5, 1987

DIGEST

Whether successful bidder to supply field range lids intends to use, without authorization, government tooling furnished under another contract, or to provide used lids, does not affect the responsiveness of the bid since the bid does not take exception to the invitation's requirements. Rather, the issue involves the bidder's responsibility and, subsequent to an award, contract administration which the General Accounting Office does not generally review.

DECISION

State Machine Products (SMP) protests the award of a contract to Nash Metalware Co., Inc. (Nash) under invitation for bids (IFB) No. DLA400-86-B-8226, issued by the Defense General Supply Center (DGSC), Richmond, Virginia. The procurement is for the acquisition of 500 lid assemblies to be used as spare parts for gasoline field range outfits. SMP complains that Nash's low price was based on the unauthorized use of government tooling furnished to Nash under other contracts.

At the time the IFB was issued, DGSC planned to furnish government tooling to the contractor for use in performing the contract. DGSC later discovered that the government only inventoried tooling sets for the entire field range and not just the lid assembly. Accordingly, the IFB was amended to delete the provision requiring use of government tooling. Nash has field range tooling in its possession for the performance of other contracts, and SMP suspects that Nash will use that tooling to perform this contract. SMP contends that Nash's price otherwise is too low to account for tooling costs. SMP argues that Nash therefore has a competitive advantage over other bidders who must include the costs of tooling in their bids.

037956

DGSC states that Nash intends to purchase the 500 lid assemblies from another supplier which, in turn, purchased the assemblies in a liquidation sale from yet another supplier, Armstrong Products Corporation (Armstrong). If that is correct, SMP offers evidence showing that Armstrong may have used government furnished tooling to produce its lid assemblies, and contends that Nash will unfairly benefit from being able to acquire the lids at a resultingly lower price. SMP also offers a letter from an Armstrong official stating that Armstrong may not have had 500 lids assemblies in inventory at liquidation.

Initially, we point out that the IFB does not prohibit the use of government tooling in a bidder's possession, and the unauthorized use of such tooling would be prohibited by a clause in the contract under which the tooling was provided. We further point out that since the IFB does not provide for the successful offeror to use government furnished property in its possession, the offeror may not do so without the consent of the contracting officer having cognizance over the property, and then the contractor must pay the appropriate rental charge. Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 45.402 and 45.202-2 (1986).

In any event, Nash's bid did not propose to use government furnished tooling or to take exception to any of the IFB's requirements, and the bid therefore was responsive. See Great Lakes Dredge & Dock Co., B-221768, May 8, 1986, 86-1 CPD ¶ 444. The agency determined that Nash was responsible--that is capable of fulfilling the IFB's requirements--and we will not review that determination absent circumstances not present here. See Peter Gordon Co., B-224011, Sept. 15, 1986, 86-2 CPD ¶ 300. Whether Nash actually performs in compliance with contract requirements or uses government furnished tooling under another contract is a matter of contract administration under the respective contracts. This Office generally does not review matters of contract administration. 4 C.F.R. § 21.3(f)(1) (1986); Descomp Inc., B-220085.2, Feb. 19, 1986, 86-1 CPD ¶ 172.

Regarding Nash's alleged advantage in being able to provide Armstrong lids, a competitive advantage is improper only where the advantage results from preferential treatment of an offeror or other unfair action by the government. A competitive advantage accruing to an offeror due to other circumstances need not be equalized in favor of the other offerors. Product Research, Inc., B-223439.2, Sept. 18, 1986, 86-2 CPD ¶ 317. Thus, the fact that Nash has access to lids previously manufactured with government tooling is not a valid basis for protest.

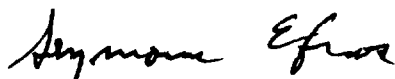
To the extent Nash plans to purchase Armstrong lid assemblies, SMP argues that Nash's bid is nonresponsive for contravening a standard clause in the IFB requiring that new supplies be delivered. FAR, 48 C.F.R. § 52.210-5 (1985). What Nash intends to deliver does not affect the responsiveness of its bid because the bid did not take exception to the requirement for new supplies nor indicate that Nash intended to purchase Armstrong lids. In any event, the fact that the lid assemblies may have passed through several suppliers does not mean that the assemblies are not "new"; moreover, since the bid was responsive, this issue again involves, in the first instance, Nash's responsibility and, after award, a matter of contract administration.

SMP also argues that Nash misrepresented to DGSC that it would manufacture the lid assemblies because Nash represented in its bid that it was a manufacturer of the supplies offered. This representation is required by FAR, 48 C.F.R. § 22.608-1 (1986), to determine an offeror's eligibility under the Walsh-Healey Public Contract Act, 41 U.S.C. §§ 35-45 (1982), which requires that public supply contracts be awarded only to regular dealers or manufacturers that agree to meet certain minimum labor standards. As provided by our Bid Protest Regulations, our Office does not consider the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act. 4 C.F.R. § 21.3(f)(9). The contracting agency determines the bidding firm's status, subject to review by the Small Business Administration (if a small business is involved) or the Secretary of Labor. We point out, however, that a company may certify itself as a manufacturer for Walsh-Healey Act purposes and nevertheless subcontract for the supplies to be furnished under a particular contract. See Stellar Indus., Inc.--Request for Reconsideration, 64 Comp. Gen. 748 (1985), 85-2 CPD ¶ 127.

Finally, SMP points out that, in completing the "Preference for Labor Surplus Area Concerns" clause, FAR, 48 C.F.R. § 52.220-1, Nash left blank the space for identifying subcontractors which account for more than 50 percent of the contract price. However, the clause itself provides that failure to fill out the space only precludes consideration of the offeror as labor surplus area concern.

We therefore find no basis to object to DGSC's awarding Nash the contract.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel

B-224260