



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Protective Materials Co., Inc.

File: B-225495

Date: March 18, 1987

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### DIGEST

1. Agency decision in a procurement for construction of a new embassy not to reopen negotiations after receipt of best and final offers to give protester the opportunity to incorporate its late price modification is not objectionable where record indicates that protester had a fair opportunity to submit a best and final offer with its most favorable terms by the closing date for receipt of best and final offers and agency determined that any further delay in the procurement would unreasonably jeopardize embassy construction project.
2. Where the acceptance period on all proposals has expired, the contracting officer may allow an offeror to waive the expiration of its proposal acceptance period without reopening negotiation to make an award on the basis of the offer as submitted since waiver under these circumstances is not prejudicial to the competitive system.
3. Allegation that agency improperly waived provision which requires that successful offeror hire a single firm window fabricator with 5 years experience to assume responsibility for all components of window work is denied where record shows that this provision was superseded by a subsequent amendment to the solicitation and that all offerors were aware that the provision was no longer applicable.
4. General Accounting Office does not review affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of procuring officials or the misapplication of a definitive responsibility criteria.
5. Protest filed with General Accounting Office more than 10 working days after initial adverse agency action at that level is untimely and will not be considered on the merits.

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6. Protest against amended solicitation award scheme filed after closing date established by the amendment is untimely.

7. To be considered an interested party to have standing to protest under the Competition in Contracting Act of 1984 and GAO Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or failure to award a contract. A potential supplier to a government contractor which is not an actual bidder or offeror itself, is not an interested party.

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## DECISION

Protective Materials Co., Inc. protests the Foreign Buildings Office, Department of State (FBO) selection of Export Technicians Inc. (ETI) as a supplier of blast resistant windows and doors to FBO's prime contractor, Kajima International Inc./Kajima Corp. for the construction of a new U.S. Embassy in Cairo, Egypt. We deny the protest in part and dismiss it in part.

On April 29, 1986, FBO issued solicitation No. 86-FBO-CW for the blast resistant windows and doors. Nine firms, including the protester, submitted offers in response to the solicitation. By amendment No. 4 to the solicitation, FBO advised offerors that the firm selected for award would not enter into a contract with FBO, but instead FBO would nominate the firm selected for award as a subcontractor to Kajima.<sup>1/</sup> Selection was to be based on the low technically acceptable offer.

Seven firms including the protester submitted best and final offers (BAFOs) by the August 19, 1986, closing date. ETI submitted the low acceptable BAFO and Protective submitted the second low BAFO. Subsequently, by letter of October 2, 1986, Protective submitted a new unsolicited BAFO, offering a price reduction below ETI's offer. By letter of October 16, 1986, FBO rejected Protective's October 2, price reduction as a late proposal modification. By a change order to Kajima's construction contract issued on November 17, 1986, Kajima was "instructed to accept the nominated subcontract offer of ETI" for supply of the blast resistant windows and doors.

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<sup>1/</sup> While normally our Office does not review the award of subcontracts under our Bid Protest Regulations (4 C.F.R. § 21.3(f)(10)), where, as here, the procurement was conducted, proposals evaluated, and the selection made, by FBO, we consider this to be a subcontract "by" the government.

Protective protests FBO's refusal to consider its October 2, 1986, price reduction. The firm argues that the "government erred in rejecting [its October 2, 1986, price reduction] since [by that time] all solicited offers had expired" and FBO had not completed negotiations with Kajima to accept ETI as its subcontractor.

FBO argues that it properly rejected Protective's October 2 price reduction submitted more than a month after the August 19 BAFO closing date. FBO points out that the solicitation incorporated Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.215-10 (1985), which provides that a modification to a proposal resulting from the contracting officer's request for BAFOs received after the time and date specified in the request will not be considered except in circumstances not applicable here. FBO also points out that given the length of time this procurement had been in process [over several months] and the agency's urgent need to proceed with the construction of a new secure embassy building in Cairo, the decision was made not to delay the procurement any longer by reopening negotiations to give Protective the opportunity to incorporate its late price modification.

FBO also argues that it properly permitted ETI to waive the expiration of its offer and on the basis of ETI's low technically acceptable offer properly nominated that firm as a subcontractor to Kajima.

We have held that an agency may, but is not automatically required to, reopen negotiations with all offerors where one offeror submits a late proposal modification that reduces its price. Rexroth Corp., B-220015, Nov. 1, 1985, 85-2 C.P.D. ¶ 505. The decision to open discussions in these circumstances is discretionary with the contracting agency. Discussions need not be opened unless a potentially significant proposed price reduction, or some other proposed modification, fairly indicates that negotiations would prove to be highly advantageous to the government. The Marquardt Co., B-224289, Dec. 9, 1986, 86-2 C.P.D. ¶ 660; Mayden & Mayden, B-213872.3, Mar. 11, 1985, 85-1 C.P.D. ¶ 290; Data Technology Industries, Inc., B-197858, July 1, 1980, 80-2 C.P.D. ¶ 2.

We find that FBO's determination not to consider Protective's unsolicited October 2 price modification proper. In our view, FBO reasonably determined not to reopen negotiations with all offerors merely to consider Protective's price modification. The record shows that Protective had a fair opportunity along with other offerors to submit a BAFO with its most favorable terms by the August 19, 1986, closing date. Moreover, the record further indicates that the

reopening of negotiations which, as noted above, would have been required to permit consideration of the late modification, would delay the selection of a subcontractor to provide blast resistant windows and doors and, thus, hamper construction of an urgently needed secure embassy building as well as further delay this procurement. We find no basis to question the reasonableness of FBO's decision. See The Marquardt Co., B-224289, supra; Data Technology Industries, Inc., B-197858, supra.

Further, we note that it is not improper for an agency to accept an expired offer for a proposed award without reopening negotiations. We have held that where, as here, the acceptance period has expired on all proposals, the contracting officer may allow the successful offeror to waive the expiration of its proposal acceptance period without reopening negotiations to make an award on the basis of the offer as submitted since waiver under these circumstances is not prejudicial to the competitive system. Data Technology Industries, Inc., B-197858, supra. Therefore, we cannot object to FBO's decision to nominate ETI on the basis of its low technically acceptable BAFO where ETI waived the expiration of its offer acceptance period.

Protective also protests that ETI does not meet the solicitation quality assurance requirement that the successful offeror "engage a single firm to assume undivided responsibility for all components of window work . . . who can demonstrate not less than 5 years successful experience in fabrication of window work similar to window work of this project." The protester points out that ETI is not a window fabricator but instead is a broker which intends to subcontract the window fabrication to three different window component manufacturers. Protective maintains that ETI cannot satisfy the above requirement that a single firm assume full responsibility for all components of window work and that FBO, in determining ETI the successful offeror, improperly waived this requirement.

Initially, we note that this requirement for a single firm fabricator was inserted by amendment No. 1, prior to the decision by FBO, by subsequent amendment, to change the solicitation from a direct contract with FBO to one in which FBO nominates the successful offeror as a subcontractor to Kajima. Under the revised solicitation and executed contract documents between Kajima and FBO, the prime contractor is responsible for the supply and installation of the windows and the window supplier is merely a subcontractor to Kajima. Thus, although not specifically repealed, the quality assurance provision which ETI allegedly failed to meet was

superseded by a subsequent amendment and actions of FBO, placing the responsibility for the window system on Kajima. By amendment, ETI has no direct responsibility to the government. In fact, the protester concedes that Kajima, not the nominated subcontractor, is responsible for successful window fabrication and installation. Under these circumstances, we find this protest basis without merit.

Protective further contends that because ETI is a broker, it generally lacks the capability and experience to perform the work. Allegations of lack of capability and experience to perform concern matters of responsibility. A contracting agency must make an affirmative determination of an offeror's responsibility prior to determining the successful offeror and our Office does not review such a determination absent a showing of possible fraud or bad faith on the part of contracting officials or that definitive responsibility criteria contained in the solicitation were not met. Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 C.P.D. ¶ 403. Neither exception applies here.

Protective also alleges that in violation of Department of State "security principles" and regulations, ETI and its subcontractors do not hold certain security clearances. Our review of the solicitation reveals no requirement for any specific security clearance and Protective does not allege otherwise. In any event, because a security clearance relates to a firm's ability to perform, whether a prospective contractor has or has the ability to obtain any necessary security clearances is a matter of responsibility which, as discussed above, we will not review. 4 C.F.R. § 21.3(f)(5). General Port Services Inc.; General Offshore Corp., B-211627.3, B-211627.4, Sept. 26, 1984, 84-2 C.P.D. ¶ 358; Richard A. Schwartz Associates, Inc., B-214979, June 29, 1984, 84-1 C.P.D. ¶ 695.

Protective also protests the issuance of amendment No. 4 to this solicitation. This amendment, as explained above, provides that the firm nominated for award would not enter into a contract with FBO, but instead FBO would nominate the firm selected for award as a subcontractor to Kajima. Protective maintains that FBO's decision to nominate a subcontractor rather than contract with a window supplier directly, results in "unknown risks and costs for all [offerors] except ETI" which had previously subcontracted with Kajima for the embassy windows. The record indicates that while ETI previously subcontracted with Kajima to supply windows for the embassy, ETI's contract was terminated following FBO's decision to upgrade security requirements for the windows. FBO subsequently issued the subject solicitation reflecting its revised need for upgraded windows.

Protective also protests the request for BAFO's contained in the amendment. Protective believes that award should have been made on the basis of prices as initially submitted.

These bases for protest are untimely. The amendment was issued on August 8, 1986. Prior to the August 19, 1986, BAFO closing date established by the amendment, Protective timely protested to FBO the decision to nominate the firm selected for award as a subcontractor and the request for BAFO's contained in amendment. FBO proceeded with the procurement and by letter dated September 5, 1986, denied Protective protest.

Where, as here, a timely protest has been filed initially with the contracting agency, any subsequent protest to our Office will be considered if filed within 10 days after the protester receives notice of adverse agency action. 4 C.F.R. § 21.2(a)(3) (1986). Here, FBO's continued receipt of BAFO's on August 19, 1986, constituted initial adverse agency action, i.e., notice that FBO intended to proceed with the procurement in the face of Protective August 14 protest against the changes incorporated by the amendment. See TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 C.P.D. ¶ 198. Therefore, Protective's protest concerning this matter filed with our Office on November 18, 1986, several months after initial adverse agency action, is untimely and will not be considered on the merits. Likewise, Protective's protest that FBO should have allowed Kajima to subcontract with any offeror FBO determined technically acceptable is also untimely since it was not filed prior to the closing date of the amended RFP which advised offerors that FBO intended to nominate a subcontractor on the basis of the low technically acceptable offer. 4 C.F.R. § 21.2(a)(1).

Finally, Protective protests that Kajima is ineligible to contract with the government to provide and install the windows and doors because it is not a U.S. firm. In this regard, Protective argues that under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, section 402, 100 Stat. 853, 864 (1986), only U.S. persons and qualified U.S. joint venture persons may bid on construction or design projects which involve physical or technical security. FBO states that Kajima is, in fact, a U.S. firm.

Protective is not an interested party to protest this matter. The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (Supp. III 1985), defines an interested party for purposes of eligibility to protest as an "actual or prospective bidder or offeror who direct economic interest would be affected by the award of the contract or by the failure to award the contract. This statutory definition of

an interested party is reflected in our Bid Protest Regulations implementing CICA. See 4 C.F.R. § 21.0(a). Since Protective's status in this procurement is that of a potential supplier of windows to Kajima (there is no indication that Protective is an actual or prospective bidder or offeror for the general construction services to be provided by Kajima and Protective does not allege otherwise), it is not an interested party under CICA and our regulations to protest the award to Kajima made 3 months before this solicitation was issued. See George Enterprises--Request for Reconsideration, B-225885.2, Jan. 20, 1987, 87-1 C.P.D.  
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The protest is denied in part and dismissed in part.

*for Seymour Efron*  
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General Counsel