

me Allen



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: East/West Industries, Inc.
File: B-228301
Date: December 21, 1987

DIGEST

1. Where agency rebuts an issue raised in the initial protest and the protester fails to respond to the agency's rebuttal in its comments to the agency report, the issue is deemed abandoned.
2. Protest against failure to consider costs of qualification testing, which were not included among evaluation factors listed in the solicitation, is untimely as protests relating to solicitation deficiencies must be filed prior to the closing date for receipt of proposals.
3. Protest that successful offeror is not able to make an aircraft ejection seat survival kit, a vital safety-related item, without obtaining a contract modification for qualification testing is dismissed as concerning an affirmative determination of responsibility and contract administration, neither of which issue is for consideration by the General Accounting Office.

DECISION

East/West Industries, Inc. (EWI) protests the award of a contract for SKU-2/A survival kits to American Safety Flights Systems (ASFS), Inc. by the Department of the Navy Aviation Supply Office (ASO). EWI claims, without elaboration, that the Navy failed to evaluate the cost elements of proposals in accordance with its announced criteria and also objects to the Navy's failure to select the proposal offering the "lowest ultimate cost" by failing to consider costs associated with purchasing an unqualified and not yet produced survival kit from ASFS.

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

The agency originally sought to satisfy its requirements in August 1985, through a procurement limited to EWI and Grumman Aerospace Corporation. However, in response to the

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Commerce Business Daily announcement, ASFS advised the agency of its interest in competing for and producing the SKU-2/A and in January 1986, submitted a proposal with technical data. The Naval Air Systems Command reviewed ASFS' proposal and concluded that ASFS was capable of designing, qualifying and producing a kit to meet the relevant Grumman specification. Accordingly the agency decided to conduct a competitive negotiated procurement.

ASO issued request for proposals (RFP) No. N00383-87-R-4959 on June 10, 1987 to acquire 870 SKU-2/A survival kits less oxygen hoses, identified by Grumman part number, with a first article sample of five kits and a production lot sample of one kit.

The RFP requested detailed, specific and complete technical proposals to enable government engineering personnel to make a thorough evaluation of the proposed SKU-2/A and a determination that the proposed unit would have a reasonable likelihood of meeting the requirements and objectives of the government. The RFP stated that technical proposals should clearly and fully demonstrate that the offeror had a valid and practical design and engineering solution to the technical problems inherent in the design and engineering of the SKU-2/A and should set forth the offeror's proposed design, including engineering techniques, in sufficient detail to permit the government to make its evaluation.

The RFP provided that the government would award a contract to the responsible offeror whose offer conforming to the solicitation was the most advantageous to the government, cost or price and other factors considered. Specifically, the RFP did not contemplate evaluation of the relative technical merit of proposals; rather, under the RFP, award would be made to the lowest-priced technically acceptable offeror. The RFP also included as evaluation factors the clauses at Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.247-47 (1987), Evaluation - F.o.b. Origin, § 52.247-46, Shipping Points Used in Evaluation of F.o b. Origin Offers, and § 52.247-49, Destination Unknown.

ASO received two responses by the closing date of July 15. As requested by the solicitation, ASFS submitted a 56-page technical proposal listing qualified parts, components that ASFS proposed to qualify by similarity and a list of new components to be qualified. Additionally, ASFS submitted a first article test program for demonstrating compliance with the Grumman specification. Agency technical personnel reviewed ASFS' response to the solicitation and rated ASFS'

proposal as technically acceptable. EWI's 5-page proposal was deemed unacceptable at first but was upgraded to marginally acceptable in view of EWI's experience as a previous supplier to Grumman. ASFS' offer of \$2,725,429.00 was about one-fourth less than EWI's offer of \$3,551,340.00.

The agency declined to waive first article testing for either offeror and determined that evaluation of transportation costs would have no effect on the standing of offerors. The contracting officer determined ASFS to be responsible and awarded a contract to ASFS as the low responsible and technically acceptable offeror on September 16, 1987. On September 17, EWI filed its protest with this Office.

EWI has presented no evidence that ASO failed to apply the evaluation criteria listed in the solicitation. In its agency report, the Navy presents a detailed explanation of its evaluation methodology and advances numerous arguments in support of its selection decision. The agency report also refers to a dispute with EWI over shipping weight estimates but, as stated above, the Navy concluded that the amount in dispute was too small to affect the offerors' relative standing. In commenting on the agency report, EWI declined to address any of these issues concerning the Navy's evaluation or to identify the solicitation criteria that were allegedly not applied. Under these circumstances, we consider EWI to have abandoned this protest ground. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

In its comments to the agency report, EWI does stress the risks run by entrusting production of a vital survival item to an unproven producer working on an unproven design. As noted in the agency report, the SKU-2/A is a retrofit item, replacing the RSSK-7 kit as part of an operational safety improvement program. The RSSK-7 has a history of opening during ejection, resulting in the loss of survival items such as the life raft, medical supplies and beacon; the kit's emergency oxygen kit has also been unreliable.

EWI argues that without qualification testing, the Navy runs a risk of buying hardware that will simply not work in practice. EWI, having manufactured the kit for Grumman, insists that it is the only qualified producer. EWI challenges the agency's failure to consider the costs of qualification testing in evaluating proposals and predicts that ASO will have to modify the contract to add qualification testing and qualification testing review to the work required by the contract. EWI argues that ASFS has not demonstrated the ability to produce a functional kit.

These omissions concern alleged improprieties apparent on the face of the solicitation which EWI received in June. Protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1987); Washington Patrol Service, Inc., B-228180, Sept. 30, 1987, 87-2 CPD ¶ 317. Here, EWI did not timely protest before the closing date. Further, the alleged need to add qualification testing and qualification testing review to ASFS' contract is a matter of contract administration that is not for consideration by our Office. 4 C.F.R. § 21.3(f)(1); LORS Machinery, Inc.--Reconsideration, B-227499.2, July 13, 1987, 87-2 CPD ¶ 41. Regarding the challenge to ASFS' ability to perform, our Office will not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith or a demonstration that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(f)(5); Hotel Donuts and Pastries, B-227306, Sept. 18, 1987, 87-2 CPD ¶ 275. No such circumstances are present here.

In fact, the record contains ample evidence of the care taken by the agency and its technical community to insure a reasonable expectation that ASFS would meet all requirements of the specification. ASFS' original proposal submitted in early 1986 was carefully studied to determine whether ASFS demonstrated both a capability of producing the kit and the feasibility of its technical approach. ASFS' technical proposal submitted in response to the instant solicitation was much more detailed than that submitted by EWI and provided evidence considered sufficient by the agency to establish ASFS' ability to produce kits according to the government's needs.

Agencies may limit competition for supplying certain parts where necessary to assure the safe, dependable and effective operation of government-equipment to sources that have satisfactorily manufactured or furnished them in the past. However, they may only do so if there are no adequate data, test results and quality assurance procedures available. In this case, the agency has determined that such procedures are available, and we will not disturb an agency's determination as to the appropriate testing procedure unless it

is shown to be unreasonable. Aero Technology Co., B-227374, Sept. 25, 1987, 87-2 CPD ¶ 301. No such showing has been made.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel