



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Colt Industries, Inc.
File: B-231213.2
Date: January 23, 1989

DIGEST

1. Contention that agency's decision to make award under solicitation to low offeror improperly was based on factors other than price which were not disclosed to the protester is without merit, where the award was in fact based on price alone, and remarks by contracting officials to protester after award could not reasonably be interpreted to mean that the agency had changed the basis for award.
2. Where record shows that contracting officer reasonably relied upon preaward survey in finding offeror to be responsible, there is no basis for concluding that affirmative responsibility determination of contracting officer was made in bad faith.

DECISION

Colt Industries, Inc. protests the award of a contract to FN Manufacturing, Inc. under request for proposals (RFP) No. DAAA09-87-R-1225, issued by the United States Army Armament Munitions & Chemical Command, Rock Island, Illinois for an amended quantity of approximately 266,000 each M16A2 rifles. Colt principally contends that proposals were not evaluated in accordance with the solicitation's evaluation scheme and that the Army made a bad faith determination that FN was a responsible prospective contractor.

We deny the protest.

The RFP was issued on May 18, 1988 with a closing date of September 9, 1988. The RFP contemplated the award of a 5 year multi-year contract and was restricted pursuant to a Justification and Approval (J&A) to those domestic and Canadian firms which, within approximately the last 10 years, had manufactured U.S. or Canadian military firearms having a bore of 40mm or less. The RFP incorporated by reference Federal Acquisition Regulation (FAR) § 52.215-16 (FAC 84-17), which provided that award

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would be made to that responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the government, price and other factors considered.^{1/} The RFP did not contain technical evaluation criteria for determining the relative technical merit of proposals. Thus, under the RFP's evaluation scheme, award would essentially be made to a responsible offeror on the basis of price alone.^{2/}

The Army received proposals from Colt and FN. The unit price submitted by FN was \$420, and the unit price submitted by Colt was \$477.50. The price of each offeror was evaluated taking into consideration the other price-related factors (e.g. royalties and transportation). The total evaluated FN price was \$112,652,562, and the total evaluated Colt price was \$127,685,780. The contracting officer made an affirmative determination of FN's responsibility, and award was made to FN on September 29, 1988. On October 6, Colt filed this protest.

First, Colt contends that proposals were not evaluated in accordance with the RFP evaluation criteria. Colt argues that any award based on factors other than price is inconsistent with the RFP. According to Colt, at a debriefing on October 15, it was expressly informed by Army contracting personnel that contract award was based on "price and other factors," suggesting that a price/technical tradeoff analysis had been made by the Army. To support its position, Colt submitted affidavits from its representatives who attended the debriefing. In the affidavits, the Colt representatives state that Army officials told them that (1) a "technical acceptability" determination had been made as a part of the evaluation, and (2) award was based on "price and other [allegedly undisclosed] factors." Colt contends that the Army's failure to identify the other factors, and its failure to disclose the existence of an allegedly "secret" price/technical trade-off analysis, denied Colt the

^{1/} As part of price evaluation, Section M of the RFP specified the evaluation of other price-related factors such as transportation costs, patent and technical data royalty costs, and abnormal maintenance costs.

^{2/} At a pre-solicitation conference, Colt states that it "concluded [at that time] that the sole evaluation factor for contract award would be proposed cost or price [and that] technical and management factors . . . would be evaluated solely in the context of the responsibility determination."

opportunity to address those other factors and materially prejudiced Colt's ability to compete.^{3/}

We do not agree. None of the contracting officials' statements described by Colt indicates that the agency's award decision was not based on price, and the record clearly shows that award was in fact made solely on the basis of price to the low responsible offeror. The statements that award was based on "price and other factors" does not indicate that those other factors were not in fact those price-related factors actually used by the Army in the evaluation of each offeror's price. In addition, the fact that a "technical acceptability" determination may have been made simply means that the Army awarded to the lowest priced offeror whose offer conformed to the RFP, and cannot reasonably be interpreted to mean that the Army had changed the basis for award. Therefore, since award was made to the low offeror, it is evident that the Army's award decision was based on the only factor identified in the solicitation, i.e., price alone.

Next, Colt challenges the Army's determination that FN is a responsible contractor and claims that the Army failed to consider information that FN: (1) was delinquent on a substantial number of its current contracts; (2) lacked financial capacity; and (3) had quality deficiencies. Colt alleges that the Army in bad faith deliberately chose to ignore the "performance risks" associated with the FN award and that the Army was motivated to award the contract to FN simply to deny the award to Colt.

Our Office will not take exception to an affirmative determination of contractor responsibility unless, as pretains here, the protester makes a showing of possible fraud or bad faith on the part of the procuring officials. 4 C.F.R. § 21.3(m)(5) (1988); Information Systems & Networks Corp., B-218642, July 3, 1985, 85-2 CPD ¶ 25.

Colt has made no showing that the responsibility determination was made in bad faith. In making his affirmative responsibility determination, the contracting officer primarily relied upon a September 26 preaward survey by the

^{3/} Colt also relies on a telephone conversation that its representative had with an Army contract specialist who allegedly stated that if Colt's unit price had only been 10 percent higher than FN's price, a different award selection decision would have been made. According to Colt, this also supports the existence of a price/technical tradeoff.

Defense Contract Administrative Services Management Area (DCASMA), Atlanta, recommending award to FN. This survey included a review of the following areas: technical capability, production capability, quality assurance capability, financial capability, accounting system, government property control, transportation, packaging, security, plant safety, and ability to meet the delivery schedule. The preaward survey team concluded that FN had the financial, technical and production capability to successfully produce the M16A2 rifle. The survey also showed that although FN had a 23 percent delinquency rate, its delinquency rate had dropped 35 percent since July 1, and the trend indicated that FN's delinquencies would continue to decline. The survey also found that the conditions that caused the recent relatively high delinquency rate had been corrected. Moreover, a detailed financial analysis was made of FN, which confirmed that it had the financial resources to perform this contract.

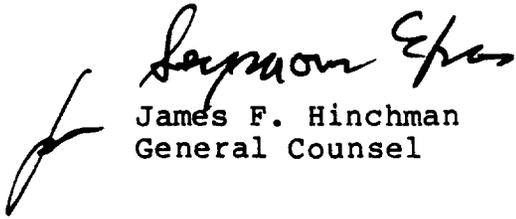
While Colt disputes the findings of the preaward survey, the record indicates that the preaward survey team considered the various factors related to the matter of FN's responsibility, including its delinquency rate and financial capabilities, and found all to be satisfactory. We believe that the contracting officer reasonably could rely on the preaward survey, and we find that Colt has not demonstrated that the contracting officer's determination that FN is responsible was made in bad faith. Accordingly, we find no merit to the protester's contention.

Finally, in its comments to the agency report and informal conference, Colt protests that the J&A relied upon by the Army to issue this RFP on a restricted basis is legally deficient. Colt argues that the J&A contained a number of material irregularities, such as improper numbering, different type face on certain pages, and no mechanically stamped control number on all pages. Colt contends that the J&A is invalid on its face, and therefore the contract award resulting from the RFP is also invalid.

However, Colt has not shown that it was prejudiced by any alleged defect in the J&A, since by the terms of the J&A, Colt was included in the competition, and Colt in fact competed. Prejudice is an essential element of a viable protest, and where no prejudice is shown or is otherwise

evident, this Office will not disturb an award even if some technical deficiency in the award process may arguably have occurred. Honeywell Information Systems, Inc., B-191212, July 14, 1978, 78-2 CPD ¶ 39.

The protest is denied.



James F. Hinchman
General Counsel