

Benjamin



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Baldt, Inc.
File: B-235102
Date: May 11, 1989

DIGEST

Where offeror certifies in its offer that it will supply a chain of United States origin as required by solicitation and offeror does in fact have a manufacturing facility in the United States, contracting officer did not act in bad faith in making an affirmative determination that the offeror was responsible.

DECISION

Baldt, Inc., protests the award of a contract to Lister Chain & Forge, Inc., under request for proposals (RFP) No. N00104-89-R-T212, issued by the Department of the Navy, Ships Parts Control Center (Navy), for a quantity of three-fourths of an inch non-magnetic, stud-link anchor chains to be used with minesweepers. Baldt alleges in its protest that since the RFP identified the procurement as a Foreign Military Sale (FMS), the Navy violated the Arms Export Control Act and the Department of Defense (DOD) Appropriations Act of 1989 by awarding the contract to Lister, an alleged foreign firm. Baldt also alleges that the Navy acted unreasonably, arbitrarily and capriciously, that the award to Lister was fraudulently made, and motivated by bad faith on the part of the contracting officials.

The Navy requests that we dismiss Baldt's protest because it is based on matters strictly concerning contract administration, and thus not within our Office's bid protest functions. We agree with the Navy's position and dismiss the protest.

The Navy issued the RFP on December 28, 1988. Lister submitted its offer on January 26, 1989, prior to the closing date of January 27. In its offer Lister indicated the place of performance of the contract as Blaine, Washington; the mode of delivery and shipping origin for the chain as "FOB, Blaine;" and certified that it was a United States (i.e., domestic) manufacturer incorporated under the

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laws of the State of Washington. Defense Contract Administration Services Management Area (DCASMA) specialists contacted by the Navy on March 13, indicated that Lister had a manufacturing facility at Blaine, that Lister produced excellent quality products in a timely manner, that it had no delinquencies, that Lister was familiar with DOD rules and regulations and recommended the award. By message dated March 15, Lister reassured the Navy that the chain quoted in its offer submitted under the RFP would be manufactured in its plant in Blaine. Based on the information certified in Lister's offer and that supplied by DCASMA, the Navy found Lister to be responsible and awarded the contract to the firm on March 23. This protest followed.

The protester argues that by enacting the Arms Export Control Act,^{1/} Congress requires that procurement of defense articles to be used in FMS transactions be restricted to domestic manufacturers. Furthermore, the protester argues that by placing restrictions on appropriations in the DOD Appropriations Act of 1989,^{2/} Congress specifically limited the procurement of the anchor chain required by the RFP to domestic manufacturers. Baldt contends that Lister will not be able to supply a domestically manufactured chain because it does not have an operational facility in the United States. Accordingly, Baldt argues, Lister does not qualify for contract award under the restrictions placed on FMS transactions by the Arms Export Control Act and procurement of the chain called for in the contract from Lister, an alleged foreign manufacturer, violates the explicit restrictions in the DOD Appropriations Act of 1989.

^{1/} 22 U.S.C. § 2791 (1982) provides, in relevant part, "(a) In carrying out [The Arms Export Control Act], special emphasis shall be placed on procurement in the United States, but . . . consideration shall also be given to co-production or licensed production outside the United States of the defense articles of United States origin when such production best serves foreign policy, national security, and economy of the United States . . ."

^{2/} The relevant section provides, "None of the funds in this Act may be available for the purchase by the Department of the Defense (and its departments and agencies) of welded shipboard anchor and mooring chain 4 inches in diameter and under manufactured outside the United States." Pub. Law No. 100-463, § 8089, 102 Stat. 2270 (Oct. 1, 1988).

Baldt also argues that Lister does not have a manufacturing plant located in the United States capable of producing the chain called for within the time frames required by the contract. According to the protester, Lister has encountered numerous difficulties in obtaining required zoning permits and authorization from the local zoning board for its forging plant in Blaine. Therefore, Baldt argues, the award was made in bad faith.

Under our Bid Protest Regulations, we will not review a contracting officer's affirmative responsibility determination absent a showing that it was made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m)(3) (1988). In order to show that a responsibility determination was made in bad faith, the protester has a heavy burden of proof; procurement officials are presumed to act in good faith, and, in order to show otherwise, a protester must submit virtually irrefutable proof that the procuring officials had a specific and malicious intent to harm the protester. Ingram Barge Co., B-230672, June 28, 1988, 88-1 CPD ¶ 614.

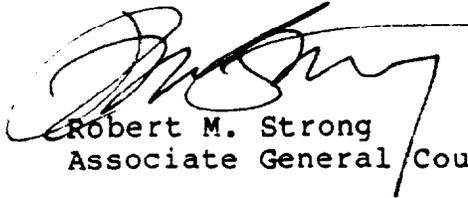
Baldt's protest falls short of the high standard of proof required to show bad faith; Baldt only alleges bad faith without any evidence. Moreover, the record indicates that Lister certified to the Navy that it was a domestic manufacturer and provided reassurances that it would perform the contract at its Blaine plant.

Furthermore, although we have held that an agency should not automatically rely on a domestic origin certification when it has reason to question whether a domestic product will in fact be furnished, see Autospin, Inc., B-233778, Feb. 23, 1988, 89-1 CPD ¶ 197, here it appears that the contracting officer did all that was reasonably necessary to ensure Lister would in fact deliver a product that complied with its offer and with the proposed contract. See Hewlett-Packard Co., B-228271, Dec. 3, 1987, 87-2 CPD ¶ 545.

To the extent that Baldt contends that Lister will not furnish a domestic product or be timely in its delivery of a first article under the contract if it does furnish a domestic product, such that final delivery may be postponed due to delays at the Blaine plant, the acceptance of Lister's offer legally obligates the firm to supply a chain that complies with the contract delivery dates and domestic manufacturing requirement. Whether the awardee ultimately does in fact comply with its legal obligations under the contract is a matter of contract administration and is not

for consideration under our bid protest function. See Astro-Med, Inc., B-228420.2, Dec. 10, 1987, 87-2 CPD ¶ 577; National Glove Co., Inc., B-229690, Dec. 23, 1987, 87-2 CPD ¶ 624; 4 C.F.R. § 21.3(m)(1).

We find that Baldt's protest concerns matters of affirmative responsibility determination and contract administration, which our Office will not review. Accordingly, we dismiss the protest. In view of our dismissal, we also find that the conference the protester requested would serve no useful purpose. Nationwide Glove Co., B-229690, Dec. 23, 1987, 67 Comp. Gen. 151 (1987), 87-2 CPD ¶ 624.


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