

McArthur



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Survival Technology, Inc.

File No.: B-235820

Date: October 5, 1989

DIGEST

Agency did not violate statutory prohibition against contracting with foreign corporations for research and development where proposal of United States firm, while found acceptable, was not evaluated as essentially equal from a technical standpoint to successful proposal of foreign firm.

DECISION

Survival Technology, Inc., protests the award of a contract to Duphar B.V. of the Netherlands under request for proposals (RFP) No. DAMD17-88-R-0115, issued by the U.S. Army Medical Research and Development Command for the development and initial production of diazepam autoinjectors and training devices. The protester contends that the agency's award of the contract to Duphar violates section 744 of the Defense Appropriations Act for Fiscal Year 1973, Pub. L. No. 92-570, 86 Stat. 1184, 1203 (1972), commonly known as the "Bayh Amendment," and also violates 10 U.S.C. § 2507(b) (1988), known as the "Price Amendment." The two statutes generally restrict the Department of Defense from contracting with foreign firms under certain conditions.

We deny the protest.

The agency issued the RFP on August 19, 1988 for a cost-plus-award-fee contract for development of the autoinjector (used to administer diazepam to soldiers as a convulsant antidote for nerve agents), with a fixed-price option for low rate initial production. The solicitation provided for consideration of 6 technical factors, comprised of 24 subfactors, including management, organization, technical capability, personnel, advanced development and initial production facilities, corporate experience and regulatory affairs. The solicitation also provided for consideration of the options in evaluating proposals for award and stated that award would be made to that responsible offeror whose offer was evaluated as being most advantageous to the

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government after consideration of technical merit and cost. The solicitation also stated that estimated costs would receive less consideration than management expertise and technical merit, except in the case of two or more proposals deemed essentially equal in technical merit.

Three offerors submitted initial proposals on October 19, 1988, and after a period of negotiations, the agency invited the protester and the awardee to submit best and final offers on April 27, 1989. Although the agency found that the protester had submitted a technically acceptable proposal, its technical evaluation found the awardee's proposal superior in technical merit. For the research and development phases of the contract, the protester submitted a lower estimated cost, but the awardee's price for the production portion (fixed-priced options) of the contract was so much lower than the protester's offer for the same work, that the awardee's price was substantially lower overall. Based on the awardee's technical superiority and lower evaluated price, the agency awarded a contract to Duphar on June 1, 1989, this protest followed.

The protester argues that the award violates the Bayh Amendment, supra, which provides as follows:

"None of the funds appropriated by this or any other Act shall be available for entering into any contract or agreement with any foreign corporation, organization, person, or other entity for the performance of research and development in connection with any weapon system or other military equipment for the Department of Defense when there is a United States corporation, organization, person, or other entity equally competent to carry out such research and development and willing to do so at a lower cost."

The protester does not challenge the agency's technical evaluation or the results of that evaluation which concluded that the awardee's proposal was superior in technical merit.^{1/} Rather, the protester argues that, as a capable

^{1/} In fact, the protester's proposal received 517 points less than the awardee's proposal (the maximum possible score was 4,560). Thus, the awardee's technical score exceeded the protester's score by approximately 11 percent. Moreover, the agency specifically found the awardee's proposal superior in numerous technical areas, including management, corporate experience, regulatory affairs, and organization, throughout the entire evaluation process.

American firm, it was "equally competent" within the meaning of the Bayh Amendment to perform the work and, since it submitted a lower price on the research and development portion of the contract, it was entitled to award. The protester contends that the term "equally competent" should be broadly interpreted. While the protester concedes that it was not the low offeror for the total basic and option requirements, it argues that "[b]y tacking on the production 'option' . . . the Army has attempted to defeat the purpose of the Bayh Amendment to protect the U.S. research and development industrial base." We do not agree.

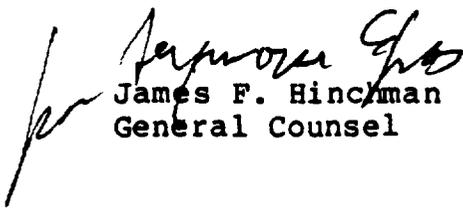
The Department of Defense has implemented the Bayh Amendment by regulation which provides that the Bayh Amendment "does not change the rules for the selection of research and development contractors set forth in FAR [Federal Acquisition Regulation] Part 35." Department of Defense FAR Supplement, § 225.7007(b) (DAC 88-4). We have no basis to question this regulation. FAR generally prescribes traditional negotiation procedures and practices in selecting a contractor. Under such traditional negotiation selection procedures, two proposals are not "equal" unless the selection official, after evaluation of proposals on a basis consistent with the solicitation's stated scheme, reasonably determines that the technical proposals are essentially equal from a technical standpoint, in which case cost or price then becomes the determinative selection factor. See, e.g., Sparta, Inc., B-228216, Jan. 15, 1988, 88-1 CPD ¶ 37. In this regard, the solicitation here explicitly provided that costs would only become determinative if "two or more proposals [were] deemed essentially equal." In the present case, the protester does not dispute that the agency reasonably found the two proposals not to be essentially equal from a technical standpoint under traditional selection rules. Accordingly, we see no basis to apply the restrictions of the Bayh Amendment which, in our view and under the regulation, restates traditional procurement rules.

We also note that, as stated above, the solicitation provided for consideration of the fixed-price option for low rate initial production and contemplated the making of one award for both research and development and initial production. Although the protester submitted a lower estimated cost for performing the research and development portion of the contract, the protester's total offer was substantially more than that of the awardee. Thus, award was made consistent with the terms of the solicitation.

The protester also claims that the award violates the Price Amendment, supra, which prohibits the use of appropriated

funds for the procurement of chemical weapons antidote contained in automatic injectors determined to be critical under the Department of Defense Industrial Preparedness Program, unless manufactured in the United States by an "existing" producer under the Industrial Preparedness Program. The agency reports that inasmuch as the diazepam autoinjector has not yet been developed, the Army has as yet made no determination that the item is critical under the Industrial Preparedness Program. Although the protester argues that the diazepam autoinjector is part of a "family" of autoinjectors and that all other autoinjectors have been determined critical, we believe that the designation of an item as critical cannot be anticipated but is a prerequisite to coverage under the Price Amendment. There is in fact no "existing" producer for the diazepam autoinjectors; we also note that the awardee and the agency report that Duphar has the capability to produce the diazepam autoinjector in the United States if the Army ultimately determines to add the item to its critical items list.

The protest is denied.


James F. Hinchman
General Counsel