



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Corbin Superior Composites, Inc.

File: B-236777.2

Date: January 2, 1990

DIGEST

1. Protest of agency's failure to set aside solicitation for small business is dismissed as untimely where not filed within 10 days after agency took the adverse action of opening bids in the face of an agency-level protest.
2. General Accounting Office (GAO) will not consider arguments that awardee should be prosecuted for alleged criminal conduct--such as knowingly making false representations in its bid or engaging in collusive bidding--since such matters are beyond GAO's bid protest function and should be referred to the Department of Justice.
3. Allegation that awardee cannot perform in accordance with a solicitation's delivery schedule concerns the contracting agency's affirmative responsibility determination which General Accounting Office will review only where the protester makes a showing that contracting officials acted fraudulently or in bad faith or misapplied definitive responsibility criteria.
4. Bidder's failure to complete the solicitation's contingent fee representation does not affect the responsiveness of its bid, since completion of the clause is not necessary to determine whether the bid meets the material requirements of the solicitation.
5. Bid is responsive to solicitation requirement for delivery f.o.b. destination where bidder enters prices in solicitation schedule which specifies that items being procured are to be "shipped to" designated locations, and nowhere in the bid does bidder take exception to the f.o.b. destination delivery requirement.

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6. General Accounting Office (GAO) will not review agency's determination that urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for a GAO decision.

DECISION

Corbin Superior Composites, Inc. protests the award of a contract to Comdyne I, Inc. under invitation for bids (IFB) No. N00104-89-B-0037, issued by the Department of the Navy Ship Parts Control Center for 7,211 inflating cylinders to be used in inflatable lifeboats. Corbin argues that the solicitation should have been set aside for small business, which would have prevented Comdyne, a large business, from competing. In the alternative, the protester contends that Comdyne's bid should have been rejected since it was nonresponsive, and that Comdyne is nonresponsive.

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

The IFB was originally synopsisized in the Commerce Business Daily (CBD) on May 23, 1989 as a total small business set-aside. The contracting officer subsequently determined that the set-aside should be withdrawn since restricting the competition to small business bidders would eliminate Comdyne, the only source that had previously passed first article testing, and because there was not a reasonable expectation that bids would be received from at least two responsible small business concerns. On June 7, the solicitation was issued on an unrestricted basis, and on June 12, a correction to the CBD synopsis was published. By letters dated June 13 and June 17, Corbin filed agency-level protests objecting to the removal of the set-aside and requesting that it be reinstated prior to bid opening.

Five bids were received and opened on July 19. The total bid prices were as follows:

	<u>With First Article Testing</u>	<u>Without First Article Testing</u>
Comdyne	\$1,677,891.25	
Corbin	\$1,846,016.00	\$1,824,383.00
Remcor	\$2,072,297.18	
Structural Composite Industries (SCI)	\$2,482,893.28	
SCI*	\$1,679,804.21	

*Nonresponsive alternate technical proposal

By letter dated July 20, Corbin filed a third agency-level protest alleging that the bids of both Comdyne and SCI should be rejected as nonresponsive, that there was evidence that Comdyne and SCI had colluded in preparing their bids, and that Comdyne would be unable to comply with the solicitation's delivery requirements.

On August 3, the contracting officer determined that Comdyne was a responsible bidder. By letter dated August 18, he denied Corbin's protests, and on August 21, he awarded a contract to Comdyne. Corbin filed a protest with our Office on August 31.

Corbin argues first that the contracting officer reasonably should have expected to receive bids from two or more small businesses and that the set-aside therefore should not have been withdrawn. We dismiss this basis of protest as untimely. Under our Bid Protest Regulations, a protest initially filed with the contracting agency must be filed in our Office within 10 working days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (1989). Here, the Navy's decision to proceed with bid opening without taking the corrective action requested in Corbin's protest constituted initial adverse agency action. See 4 C.F.R. § 21.0(f); Norfolk Dredging Co., B-236259, Aug. 11, 1989, 89-2 CPD ¶ 134. Thus, to be timely, Corbin's protest should have been filed within 10 working days after the date of bid opening, July 19. Since the protest was not filed until more than a month later, on August 31, it is untimely.

Corbin also complains that Comdyne has under previous solicitations falsely certified that it was a small business. Corbin contends that Comdyne should be prosecuted for these false representations under 18 U.S.C. § 1001 (1988), which imposes criminal penalties for knowingly making false statements to the government. We will not consider these allegations since such matters are beyond our bid protest function and should be referred to the Department of Justice. See HLT Mgmt. Group, Inc., B-225843.6, Mar. 24, 1989, 89-1 CPD ¶ 299.

Corbin further argues that Navy officials conspired with Comdyne to discredit the protester and drive it out of business and to direct the award to Comdyne. As proof of the Navy's bad faith, Corbin has submitted to our Office a copy of an affidavit from a retired naval architect, who had been involved in the development of the military specifications governing production of the cylinders. He states that on October 3, 1988, he heard the technical director of the Navy's Amphibious and Combat Support Ship Logistics Program

Office, who was responsible for management of the lifeboat program, state that "Corbin will never deliver cylinders for the Navy's lifeboats, for what he did to one of ours." (According to the affiant, the incident to which the technical director was referring involved a complaint by Corbin about the conduct of another naval employee under another contract.) The technical director, in an affidavit submitted to our Office in conjunction with a previous Corbin protest, B-235019, et al., July 20, 1989, 89-2 CPD ¶ 67, denies ever having made such a statement.

A protester alleging bias in the award selection process must offer proof not only that agency officials were biased against it, but also that this bias was translated into action that unfairly affected the protester's competitive position. Antenna Prods. Corp., B-228289, Jan. 19, 1988, 88-1 CPD ¶ 43. Here, we see no evidence that any bias in favor of Comdyne or against Corbin affected the latter's competitive position, since award under the solicitation, which was an IFB, was to be made based on price and price-related factors only, and Comdyne submitted the lowest price.

Corbin further alleges that Comdyne cannot meet the solicitation's delivery schedule unless it has conspired with the Navy to begin production of the cylinders prior to formal award of the contract. This argument concerns the agency's affirmative determination of Comdyne's responsibility, a determination we will not review unless the protester makes a showing that contracting officials acted fraudulently or in bad faith or misapplied definitive responsibility criteria. 4 C.F.R. § 21.3(m)(5); American Seating Co., B-229915, Apr. 26, 1988, 88-1 CPD ¶ 408. The protester has made no such showing here. The Navy reports that its buyer investigated Comdyne's production capability and determined that Comdyne did have the capability to meet the required delivery schedule, and the protester has offered no evidence to refute this finding. Furthermore, to the extent that Corbin is alleging that Comdyne began production of the cylinders prior to award of the contract under the assumption that it would receive the award, we note that if Comdyne in fact began production prior to award, it did so at its own risk.

Corbin also argues that Comdyne's bid should have been rejected as nonresponsive because Comdyne failed to complete certain clauses in the solicitation and completed others in a manner not conforming to the IFB. In particular, Corbin complains that Comdyne listed different prices for the various subitems under item 0001 in the bid schedule although the schedule indicated that the subitems were not

to be separately priced; that Comdyne failed to complete the contingent fee representation, the government-furnished property clause, and the evaluation of export bids clause; and that Comdyne took exception to the solicitation requirement for first article testing.

With regard to the first of these arguments, the bid schedule listed the total quantity of cylinders (i.e., 7,211) to be procured as item 0001 and then broke that total down into subitems 0001AA-0001AH to indicate the number of cylinders to be delivered to each of several different locations. In the unit price column opposite item 0001, the Navy had inserted the annotation "NSP" (not separately priced). Corbin argues that the inclusion of the annotation meant that bidders were to list the same unit price for each subitem regardless of location and that Comdyne's bid should be rejected as nonresponsive since it listed varying prices for the various locations.

The Navy responds that the annotation "NSP" opposite item 0001 did not mean that all subitems had to be priced identically; rather, according to the agency, it meant that bidders were not to price the total quantity as a separate item. We agree with the Navy that the only reasonable interpretation of the annotation "NSP" opposite item 0001 was that bidders were not to provide a separate price for the overall quantity. Accordingly, we deny this basis of protest.

Corbin's next argues that Comdyne's bid should have been rejected as nonresponsive because at the time of bid opening Comdyne had failed to complete the solicitation's contingent fee representation. We have held that completion of the representation is not necessary to determine whether a bid meets the material requirements of the solicitation; thus, the failure to complete it does not affect the responsiveness of a bid, and may be waived as a minor informality. Industrial Design Laboratories, Inc., B-215162, Oct. 16, 1984, 84-2 CPD ¶ 413. Further, Federal Acquisition Regulation (FAR) § 3.405 provides that when a prospective contractor fails to complete the representation, the contracting officer should afford it another opportunity to comply. Here, the agency indicates that Comdyne completed the representation on September 26, 1989, indicating that except for full-time bona fide employees it had not employed or retained any person or company to solicit or obtain the contract, and had not paid or agreed to pay any person or company employed or retained to solicit or obtain this contract, a fee contingent upon or resulting from the award of the contract.

Corbin further argues with regard to Comdyne's contingent fee representation that Comdyne falsely certified that it had not entered into a contingent fee arrangement. According to Corbin, Comdyne failed to reveal that it has retained the services of a former employee of the Navy office responsible for management of the lifeboat program.

Such post-award allegations concerning allegedly improper contingent fee arrangements are for consideration by the procuring agency in accordance with FAR § 3.409. HLJ Mgmt. Group, Inc., B-225843.6, supra. In addition, to the extent that Corbin is alleging that Comdyne's conduct was criminal in nature--for example, a violation of 18 U.S.C. § 1001--the matter is outside the scope of our bid protest function and should be referred to the Department of Justice. Id.

Corbin next argues that Comdyne's bid was nonresponsive because Comdyne had left blank the government-furnished property clause. This clause provides that the government will furnish to the contractor two valves for use in connection with the contract; bidders were asked to indicate where shipments of the valves could be received and the number of days after award by which they would be required by the bidder. The protester argues that Comdyne left the clause blank because it knew that it would not have to do a new first article test and therefore would not require the valves. According to Corbin, Comdyne's bid reflected that it would not accept a contract that would require a new first article test.

The Navy argues in response--and we agree--that Comdyne did not take exception to the first article testing requirement by failing to complete the government-furnished property clause. The information required by the clause is not material and thus does not affect the bid's responsiveness. Furthermore, as the agency points out, the fact that Comdyne may have assumed that the first article testing requirement would be waived if it were awarded the contract does not render its bid nonresponsive.

The protester also contends that Comdyne's bid was non-responsive because Comdyne failed to designate a port of loading for the cylinders to be shipped overseas 1/, as required by the solicitation's evaluation of export bids clause. Corbin argues that by failing to fill out subsection (F) of the evaluation of export bids clause, in which bidders were asked to indicate whether their prices were

1/ Subitem 0001AB provided for 385 cylinders to be shipped to the Pearl Harbor Naval Supply Center in Hawaii.

based on f.o.b. origin or f.o.b. destination, Comdyne indicated that it was bidding on a basis other than f.o.b. destination, which rendered its bid nonresponsive.

Paragraph (C)(2) of the evaluation of export bids clause required bidders to designate at least one of the ports of loading identified by the government in paragraph (D) of the clause as its place of delivery. The paragraph further provided that the failure to designate at least one of the ports might render the bid nonresponsive. The IFB also provided elsewhere that offers submitted on a basis other than f.o.b. destination would be rejected as nonresponsive.

Comdyne did not designate any port of loading for the overseas delivery. We agree with the Navy, however, that this did not render Comdyne's bid nonresponsive.

The clause at issue, entitled "Evaluation of export bids (or proposals)," describes how evaluations of bids will be performed where deliveries overseas are contemplated and the solicitation provides that delivery to the port of loading, rather than the overseas destination, constitutes delivery "f.o.b. destination;" the clause also describes how bids offered f.o.b. origin with transportation to the port of loading under a government bill of lading will be evaluated. The clause provides that such bids will be evaluated by adding to the bidder's price costs associated with transporting the goods from the port of loading to the overseas delivery point. In order to enable the government to calculate the added shipping and related costs necessary to evaluate the bid, the provision requires the bidder to designate which port of loading it will use, and to indicate whether it proposes to deliver f.o.b. origin with delivery to the designated port by government bill of lading, or f.o.b. destination to the port of loading.

It is unclear what application this clause has to the present IFB. As noted above, the IFB specifically required that delivery be f.o.b. destination. There is no provision which indicates that for the one overseas delivery location involved--Pearl Harbor--delivery f.o.b. destination should be interpreted as delivery to the port of loading in the continental United States, or that delivery to the point of origin with transportation to the port of loading under a government bill of lading would be acceptable. Thus, as a preliminary matter, since the applicability of the clause is at best unclear, we fail to see how Comdyne's failure to complete the clause has any bearing on the responsiveness of its bid.

Further, section B of the IFB, the schedule of supplies and prices, specified that offerors were to "ship to" each of the locations listed, consistent with the general provision in the IFB requiring delivery f.o.b. destination. By entering its prices on the bid schedule and nowhere in its bid taking exception to the f.o.b. destination requirement, Comdyne clearly obligated itself to f.o.b. destination delivery. Moreover, even assuming the "evaluation of export bids" clause applies, by obligating itself to deliver to the overseas location--Pearl Harbor--Comdyne assumed an obligation greater than that imposed by the clause, which would require delivery only to the port of loading specified by the government (Oakland, California). See Conrad Indus., Inc., B-213974.2, Aug. 7, 1984, 84-2 CPD ¶ 156. Thus, we see no basis on which to conclude that Comdyne's bid was nonresponsive for failure to complete the evaluation of export bids clause.

Corbin also argues that Comdyne's bid was nonresponsive because Comdyne took exception to the solicitation requirement for first article testing.

The IFB required first article testing and evaluation, but provided that in instances where identical or similar supplies had been delivered by the bidder and accepted by the Government under identical or similar specifications, the requirement for evaluating and testing the first article might be waived. The IFB asked bidders to indicate what their prices would be if first article testing were waived. Comdyne did not insert a price in the blank provided; instead, it inserted the words "Per page 7, delivery (Para. F-9) would become days after award." Corbin contends that by inserting this language, Comdyne conditioned its bid on waiver of the first article requirement, thereby eliminating the government's right to require first article testing and drawings.

The Navy responds that the language inserted by Comdyne simply confirmed the provision in clause F-9 of the solicitation that if production drawing approval and first article approval were waived, the number of days within which delivery was required would be calculated using the date of contract award rather than the date of first article approval as the starting point. The Navy argues that Comdyne did not take exception to the IFB's first article testing requirement by confirming that deliveries would begin sooner if the first article testing were waived.

We agree with the Navy that by inserting the cited language in its bid, Comdyne did not make its bid conditional upon waiver of first article testing. The language simply

confirmed Comdyne's understanding that if first article testing were waived, the delivery schedule would be accelerated. Rejection of Comdyne's bid as nonresponsive was therefore not required.

The protester further argues that it is apparent from the closeness of SCI and Comdyne's bids that the two bidders colluded in arriving at their prices. Corbin contends that the fact that both bidders offered higher prices for subitem 0001AF than for subitem 0001AA when the two subitems called for deliveries to the same location, and subitem 0001AA was for a substantially lesser quantity, is further evidence of collusion.

An allegation of collusive bidding raises, in the first instance, a matter to be considered by the contracting officer in the context of a responsibility determination, and since collusive bidding is a criminal offense, if the contracting officer suspects that there is collusion, the matter should be referred to the Department of Justice. Allegations of collusive bidding are not for resolution by Office. Florida Transp. Servs. Inc.--Reconsideration, B-235559.2, Sept. 6, 1989, 89-2 CPD ¶ 214. Rather, the agency indicates that in this case, the contracting officer found no reason to suspect conspiracy or collusion and determined that Comdyne was a responsible prospective contractor; thus the matter was not referred to the Department of Justice. We have no basis to disagree with the agency.

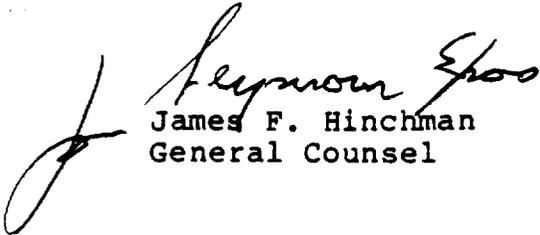
Finally, we note that Corbin has raised two additional arguments in its comments on the agency report. First, Corbin argues that the contract awarded to Comdyne was invalid since the individual who signed Comdyne's offer did not have the authority to bind the corporation. We will not consider this ground of protest because it is untimely. A protest must be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2). Here, Corbin received a copy of Comdyne's bid in mid-August; thus, Corbin learned (or should have learned) at that time the name of the individual who had signed Comdyne's offer. Since Corbin did not raise the issue until approximately 2 months later when it filed its comments on the agency report on October 26, its protest on this point is untimely.

Corbin also objects to the agency's decision to authorize contract performance despite the pendency of a protest. Corbin contends that the head of the procuring activity improperly determined, pursuant to 31 U.S.C. § 3553(d)(2) (Supp. IV 1986), that urgent and compelling circumstances

significantly affecting the interests of the United States would not permit waiting for our Office's decision.

We dismiss this basis of protest since our Office does not review an agency's determination that urgent and compelling circumstances do not permit waiting for our decision. The Taylor Group, B-234294, May 9, 1989, 89-1 CPD ¶ 436. In any event, in view of our finding that the Navy properly accepted Comdyne's bid, we fail to see how Corbin was prejudiced by the Navy's decision to proceed with performance.

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel