

Benejam



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Comspace Corporation

File: B-237794

Date: February 23, 1990

I. Becker, for the protester.
Elizabeth Nagy, Esq., Office of the General Counsel, Bureau of Prisons, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency improperly rejected protester's bid on ground that the product offered did not appear on qualified products list (QPL) where solicitation failed to identify the procurement as subject to a QPL requirement, and agency did not provide bidders with a reasonable opportunity to demonstrate the acceptability of their products prior to bid opening.

DECISION

Comspace Corporation protests award to any other bidder under invitation for bids (IFB) No. IFB 27PI-1840, issued by Federal Prison Industries, Inc. (UNICOR), for connector plugs for the Federal Correctional Institution, Danbury, Connecticut. ^{1/} UNICOR rejected Comspace's bid on the basis that Comspace was not listed as an offeror of products on a qualified products list (QPL) at bid opening. The protester basically alleges that the IFB did not identify the acquisition as subject to a qualification requirement and that it was not made aware of the QPL requirement prior to bid opening.

We sustain the protest.

^{1/} Federal Prison Industries, Inc., is a wholly-owned government corporation operating under the tradename UNICOR.

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The IFB, issued September 12, 1989, contained the standard Buy American Act clause and specified military standards to which all items required under the IFB had to conform. Five bids were received by bid opening on October 17, and Comspace was the apparent low bidder. By letter dated October 24, however, the contracting officer rejected Comspace's bid based on a determination that the connectors offered by Comspace did not comply with the Buy American Act requirements, and awarded the contract to Allied Amphenol Products, the second-low bidder, on October 27. Comspace then filed its protest in our Office on November 16. UNICOR did not suspend performance of the contract since Comspace filed the protest more than 10 days after award of the contract to Allied Amphenol.

In its report on the protest, UNICOR concedes that it erred in rejecting Comspace's bid on the basis of the Buy American Act, explaining that it had misunderstood the composition of the connectors Comspace offered. UNICOR argues that the rejection nevertheless was proper since Comspace failed to comply with the requirement that the product it offered appear on the applicable QPL. UNICOR asserts that the military standards cited in the IFB--which contain drawings and other design requirements to which products offered under the IFB must conform--"carry the requirement" listed in the corresponding military specification (MIL-C-5015G) that all products offered must be qualified for inclusion on the applicable QPL. The military specification on which UNICOR relies provides in relevant part:

"3.2 Qualification. The connectors and accessories furnished under this specification shall be products which are qualified for listing on the applicable [QPL] at the time set for opening of bids"

Additionally, paragraph 6.3 of the specification states in part:

"6.3 Qualification. With respect to products requiring qualification, awards will be made only for products which are at the time set for opening of bids, qualified for inclusion in the applicable [QPL], whether or not such products have actually been so listed by that date. The attention of the suppliers is called to this requirement, and manufacturers are urged to arrange to have the products that they propose to offer to the Federal Government tested for qualification in order that they may be eligible [for award]."

UNICOR essentially argues that since the QPL restriction is a material requirement which must be met at bid opening, Comspace's failure to be listed on the QPL at bid opening rendered its bid nonresponsive. Accordingly, UNICOR concludes that Comspace's bid was properly rejected.

Under the Competition in Contracting Act of 1984, contracting agencies are required to obtain full and open competition through the use of competitive procedures in accordance with the provisions of the Act and its implementing regulations. See 41 U.S.C. § 253(a)(1)(A) (Supp. IV 1986). In addition, contracting agencies are charged with certain specific responsibilities with respect to the use of qualification requirements. The Small Business and Federal Procurement Competition Enhancement Act, for example, provides that if an agency wishes to establish a qualification requirement, it must specify in writing and make available to potential offerors all requirements that they must satisfy to become qualified. 41 U.S.C. § 253c(b)(2) (Supp. V 1987). The statute also requires agencies to ensure that potential offerors are provided a prompt opportunity to demonstrate their ability to meet qualification requirements.^{2/} 41 U.S.C. § 253c(b)(4). Under 41 U.S.C. § 416(b), agencies are required to publish notice of such opportunity in the Commerce Business Daily for each solicitation expected to result in a contract exceeding \$25,000.

In accordance with 41 U.S.C. § 253c, Federal Acquisition Regulation (FAR) § 9.206-2 requires contracting officers to insert the "Qualification Requirements" provision at FAR § 52.209-1 when the solicitation is subject to a qualification requirement. In this case the IFB did not incorporate FAR § 52.209-1. Nevertheless, UNICOR argues that the QPL requirement was imposed by the applicable military specification, which was cited in the military standards listed in the IFB and which, as noted above, requires products to be eligible for inclusion on the QPL.

We have held that mere reference to the QPL requirement in a military specification with identical provisions to those at issue here is not a substitute for compliance with a requirement that the solicitation notify potential bidders

^{2/} 41 U.S.C. § 253c(a) defines "qualification requirement" as a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

that the QPL requirement would apply. Switlik Parachute Co., Inc., B-188404, July 20, 1977, 77-2 CPD ¶ 38. In fact, we found that the absence from the solicitation of any notice that it was restricted to QPL products rendered the IFB defective. Id.

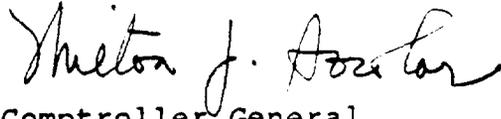
Here, UNICOR failed to identify the solicitation as restricted to QPL products, failed to notify bidders of any QPL requirement prior to, or after issuance of the solicitation, and failed to provide bidders with any information concerning the qualification requirements at any time prior to bid opening.^{3/} Further, UNICOR does not argue and the record does not show a compelling urgency precluding the agency from offering the protester an opportunity to submit its products for qualification in order to be eligible for award. See 41 U.S.C. § 253c(f) (providing emergency determination exception to qualification requirement); Sturm, Ruger & Co., Inc., B-235938, Oct. 25, 1989, 89-2 CPD ¶ 375. Thus, we find that the IFB did not adequately identify the procurement as restricted to QPL products, thereby improperly denying the protester adequate notice and an opportunity to demonstrate that its products were qualified for inclusion on the applicable QPL. Accordingly, we conclude that the agency acted unreasonably in rejecting Comspace's bid.

UNICOR states that since Allied Amphenol has substantially completed performance of the contract, corrective action is impracticable at this time. Under these circumstances, Comspace is entitled to recover its proposal preparation costs and the reasonable costs of filing and pursuing the

^{3/} Compare Southwest Marine, Inc., B-225559; B-225559.2, Apr. 22, 1987, 87-1 CPD ¶ 431, where we found compliance with the qualification requirements statutes where the agency provided prospective bidders detailed information concerning the qualification requirement several months prior to issuance of a solicitation and provided a detailed list of reasons for the agency's determination that the protester had not satisfied the qualification requirement.

protest, including attorneys' fees. See 4 C.F.R. §§ 21.6(d)(1), and (2) (1989); Sierra Eng'g, B-237820, Jan. 16, 1990, 90-1 CPD ¶ _____. Comspace should submit its claim for costs directly to the agency.

The protest is sustained.

A handwritten signature in cursive script that reads "Milton J. Azocar".

Acting Comptroller General
of the United States