



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: LSL Industries, Inc.

File: B-237710

Date: March 6, 1990

V. Jay Luthra, for the protester.
E.L. Harper, Department of Veterans Affairs, for the agency.
Robert A. Spiegel, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Agency may correct contract award error by terminating improper award.
2. Whether a contract awardee is capable of and does comply with a commercial product requirement involves matters of affirmative responsibility and contract administration which are within the discretion of the procuring agency and generally not reviewable by the General Accounting Office.
3. Whether a contract awardee is capable of and does comply with domestic product requirement involves matters of affirmative responsibility and contract administration which are within the discretion of the procuring agency and generally not reviewable by the General Accounting Office.

DECISION

LSL Industries, Inc., protests the termination for convenience of its contract for urine collection bags with the Department of Veterans Affairs (DVA) awarded under invitation for bids (IFB) No. M1-132-89. LSL also protests the agency's decision to award a contract for these items to Intermed, Inc.

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

DVA received six bids on these items; Intermed submitted the low bid. It was found that only three bidders, including LSL, submitted bid samples which were considered acceptable. The DVA inspector rejected Intermed's sample on the basis

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that the sample label indicated 48-inch tubing, instead of the minimum 56-inch tubing specified in the IFB. LSL offered what appeared at the time to be the lowest responsive bid and thus received the award.

Intermed protested to our Office that its sample product was erroneously rejected because the tubing on its sample was actually 60 inches long (4 inches beyond the minimum requirement). Intermed claimed that its product was packaged in boxes indicating a length of only 48 inches because the proper paste-over labels had fallen off. Intermed's assertion as to the length of the tubing was confirmed by the agency upon a second inspection of the firm's sample and Intermed withdrew its protest.

The agency terminated LSL's contract, since Intermed's sample was acceptable and it offered a lower price, and because no delivery orders had been placed against the LSL contract. The contract was then awarded to Intermed, and this protest followed. LSL maintains that its contract termination and the award to Intermed are improper because the DVA violated the competitive process by reevaluating Intermed's bid sample and accepting what the protester alleges is a non-commercial, foreign product which fails to meet the IFB specifications.

It is appropriate to protect the integrity of the competitive system for a procuring agency to correct a contract award error by terminating an improper award. Laclede Chain Mfg. Co., B-221880.2, May 5, 1986, 86-1 CPD ¶ 432; Abar Ipsen Indus., B-237273, Oct. 30, 1989, 89-2 CPD ¶ 396. Inasmuch as the rejection of Intermed's bid was predicated on an erroneous evaluation of its sample, we think that the DVA acted properly in terminating its contract with LSL and making the proper award to Intermed. This protest basis is denied.

LSL also contends that Intermed's product is not a commercial product as required by the IFB or in compliance with the Food and Drug Administration (FDA) food manufacturing practices. LSL alleges this is shown by Intermed's mislabeling and/or relabeling its sample packages. Intermed certified with its bid that the offered product meets standard commercial requirements and identified three customers to which this specific product was sold. The DVA accepted this certification and has further determined that Intermed is a responsible contractor.

Our Office generally does not determine whether a contract awardee is capable of and does comply with a commercial

product requirement or other contract requirements (e.g., the FDA manufacturing requirement), because these issues involve matters of affirmative responsibility and contract administration respectively, which are matters within the exercise of the procuring agency's discretion. Dura Elec. Fluorescent Starter Div., B-225323, Mar. 2, 1987, 87-1 CPD ¶ 234. Therefore, this protest basis is dismissed.

Finally, LSL speculates that even were Intermed's product commercially acceptable, it may be of foreign origin and thus in violation of the domestic product provisions of the solicitation. However, Intermed has certified that it will comply with the applicable provisions of both the Buy America Act and the Trade Agreements Act, and identified its manufacturing facility located within the United States. As indicated above, whether Intermed is capable of and does comply with the domestic product requirement are matters of affirmative responsibility and contract administration, not generally reviewable by this Office. Dura Elec. Fluorescent Starter Div., B-225323, supra. This protest allegation is also dismissed.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel