

McAuliffe



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Technology Products Manufacturing Corp.

File: B-238182.3; B-238182.5

Date: April 10, 1990

M. Glaser, for the protester.
Douglas K. Olson, Esq., Kilcullen, Wilson and Kilcullen, for
Camel Manufacturing Company, an interested party.
Col. Herman A. Peguese, Department of the Air Force, for the
agency.
Susan K. McAuliffe, Esq., Andrew T. Pogany, Esq., and
Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protest from offeror which would not be in line for award if the protest were upheld is dismissed because the protester does not have the requisite direct economic interest required to be considered an interested party entitled to maintain the protest.
2. Protest that awardee may furnish a noncomplying product is dismissed since whether or not a contractor actually performs in accordance with the solicitation's requirements is a matter of contract administration that is the responsibility of the contracting agency and is not for consideration by the General Accounting Office under the Bid Protest Regulations.

DECISION

Technology Products Manufacturing Corp. protests the proposed award of a contract to Camel Manufacturing Company under the small business set-aside portion of request for proposals (RFP) No. F09603-89-R-58264, a partial small business set-aside, issued by the Department of the Air Force for chemical warfare protective hoods. Technology also protests the award of a contract to Rabintex Industries

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under the unrestricted portion of the RFP, on the basis that Rabintex may furnish a noncomplying product.^{1/}

We dismiss the protests.

The RFP, issued on May 26, 1989, contemplated multiple awards of a fixed-price contract to the low offerors under the set-aside and non-set-aside portions of the requirement. In accordance with the RFP provision found at Federal Acquisition Regulation (FAR) § 52.219-7 (FAC 84-48), offers on the non-set-aside portion were to be evaluated first for award. The set-aside portion would then be awarded, at the highest non-set-aside contract unit price, to one or more small business concerns with a preference, in declining order, for small business concerns that were also labor surplus area concerns,^{2/} followed by other small business concerns (which did not qualify for the labor surplus area preference).

Best and final offers were received by September 15. Rabintex, an Israeli firm, submitted the apparent low offer of \$26,387,536 for the non-set-aside portion of the requirement and was awarded a contract at that price on December 21. Camel, the apparent low small business offeror located in a labor surplus area, was determined to be in line for award under the set-aside portion of the acquisition. Two other small business, labor surplus concerns were determined to be in line for award behind Camel. Technology, which did not certify in its offer that it qualified as a labor surplus concern, and which firm was not determined to be a labor surplus concern by the agency, submitted the lowest small business offer. Consequently, Technology was found to be fourth in line for award under the set-aside portion of the RFP. On December 22, in

^{1/} In its initial protest, Technology also protested the terms of the RFP providing for a partial set-aside to include an unrestricted portion. After receiving the agency report, Technology did not pursue this matter further. We deem it abandoned. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

^{2/} FAR § 52.219-7 defines a "labor surplus area concern" as a concern that, together with its first-tier subcontractors, will perform substantially in a geographical area identified by the Department of Labor as an area of labor surplus such that the costs incurred under the contract on account of manufacturing, production, and performance of services in labor surplus areas exceed 50 percent of the contract price.

accordance with FAR §§ 19.502-3 (FAC 84-48) and 52.219-7 (FAC 84-48), and Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7003 (1988 ed.), the contracting officer offered Camel an opportunity to accept the set-aside requirement at the Rabintex non-set-aside contract price.

Camel (on December 29) and Technology (on January 8, 1990) filed protests with our Office against the agency's award to Rabintex, claiming that an award to a foreign firm was improper. Both firms subsequently withdrew their protests. By letter of January 19, Camel accepted the terms of the Air Force's December 22 offer and agreed to meet Rabintex's price. On February 16, while negotiations continued with Camel, Technology filed a protest with our Office against the propriety of the proposed award to Camel, alleging that Camel was improperly afforded a preference as a labor surplus concern, and that Camel's initial offer under the non-set-aside portion allegedly expired on December 31, rendering Camel ineligible for award. Technology subsequently filed a separate protest with our Office on March 8, 1990, against the award to Rabintex, stating its belief that Rabintex allegedly intended to furnish a noncomplying product since Rabintex plans to use a material for the hoods which has a very heavy odor which would not meet the RFP's specifications.

First, Technology is not an interested party to challenge the proposed award to Camel. To be eligible to pursue a protest, a protester must be an interested party. 4 C.F.R. § 21.1(a) (1989). A protester is not an interested party where it would not be in line for award if its protest were sustained. American Mutual Protective Bureau, B-234315.4, July 12, 1989, 89-2 CPD ¶ 36. Here, even if we sustained Technology's protest against any award to Camel, the next low small business that is a labor surplus area concern, not Technology, would be in line for award under the terms of the RFP. Accordingly, Technology is not an interested party to protest the proposed award to Camel.

Technology's contentions that Rabintex may provide the Air Force with a noncomplying product is not for resolution under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1). Rabintex did not take any exception to the requirements in its proposal. Whether a contractor actually performs under an existing contract in accordance with the solicitation's requirements is a matter of contract administration that is

the responsibility of the contracting agency and is not for consideration by this Office. See William B. Hackett & Assocs., Inc., B-232799, Jan. 18, 1989, 89-1 CPD ¶ 46.

The protests are dismissed.

A handwritten signature in cursive script that reads "Ronald Berger".

Ronald Berger
Associate General Counsel