

Ms. Shimamura



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Merrick Engineering, Inc.

File: B-238706.2

Date: June 14, 1990

Charles E. Raley, Esq., Israel and Raley, for the protester.
Michael F. Krall, Esq., for Hobart Brothers Company/Advanced
Welding, Inc., an interested party.
Melvin N. Hatcher, Esq., Department of Energy, for the
agency.
Amy M. Shimamura, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest of contract award to an offeror which indicates in the solicitation's Walsh-Healey Public Contracts Act certification, 41 U.S.C. §§ 35-45 (1988), that it is not a manufacturer and which fails to certify that it is a regular dealer within the meaning of the Act, is denied where contracting agency determines, prior to contract award, that the offeror is a regular dealer of the required item, since the certification involves a matter of responsibility which may be determined any time before award.
2. General Accounting Office does not review challenges to the legal status of a firm as a regular dealer or manufacturer within the meaning of the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1988), because by law this matter is to be decided by the contracting agency in the first instance, subject to review by the Small Business Administration, when a small business is involved, and the Secretary of Labor.
3. Protest that awardee's offer is not responsive and awardee is not responsible because it will not provide a new item under the awarded contract is dismissed because the question of whether the contractor will perform pursuant to the contract is a matter of contract administration and not for consideration under the General Accounting Office's bid protest function.

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DECISION

Merrick Engineering, Inc., protests the award of a contract to Hobart Brothers Company/Advanced Welding, Inc. (Hobart), under request for proposals (RFP) No. 110605, issued by Battelle Memorial Institute for an automatic plasma arc welding system.^{1/} Battelle, a government prime contractor, manages, operates, and maintains by and for the Department of Energy (DOE) the agency's Pacific Northwest Laboratory at Richland, Washington. Merrick contends that the contract award to Hobart was improper because the awardee failed to meet definitive responsibility criteria in the RFP, and will not provide a new plasma arc welding system under the contract.

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

Federal procurement statutes and regulations do not apply per se to a management contractor operating by and for the government; such a prime contractor must conduct procurements according to the terms of its contract with the agency and its own agency-approved procedures. Our review is limited to determining whether the procurement conforms to the "federal norm," i.e., the policy objectives in the federal statutes and regulations. BECO Corp., B-219651, Nov. 26, 1985, 85-2 CPD ¶ 601.

The RFP, issued on January 12, 1990, requested proposals for the plasma arc welding system on a brand name or equal basis, specifically for the "Merrick Engineering, Inc., Plasmafix 50E or equal." Three proposals for the brand-name product were received by the January 26 proposal due date. Hobart offered the lowest priced proposal; Merrick was second low. After an affirmative determination of Hobart's responsibility, Battelle orally awarded the contract to Hobart on February 16, followed by written confirmation on February 20.

Merrick contends that the contract award to Hobart was improper because the awardee failed to certify that it was either a manufacturer or a regular dealer of the required

^{1/} Subsequent to the filing of this protest, Merrick filed another protest against the award to Hobart on different grounds (B-238706.3). This protest will be decided at a later date.

item in the RFP's Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1988), certification provision. Merrick maintains that since the Walsh-Healey Act certification requirement is a definitive responsibility criterion under the RFP, Hobart's offer was not responsive and Hobart was not responsible under the solicitation, and was therefore ineligible for contract award. We disagree.

Definitive responsibility criteria are specific and objective standards (such as a minimum period of prescribed experience) which are established by an agency for use in a particular procurement to measure a bidder's ability to perform the contract. Acurex Corp., B-235746, Sept. 29, 1989, 89-2 CPD ¶ 298. The Walsh-Healey Act certification provision does not meet this definition because it is not a specific and objective standard established for use in this procurement to measure an offeror's ability to perform the contract; rather, the certification concerns an offeror's general legal status and is applicable to all federal procurements for the manufacture or furnishing of materials, supplies, articles and equipment in an amount exceeding \$10,000. See 41 U.S.C. § 35.

The record shows that Hobart completed the Walsh-Healey Act certification provision in the RFP by indicating that it is not a manufacturer, but failed to check the box indicating that it is a regular dealer of the required item. Notwithstanding the omission, prior to contract award, Battelle determined, based on a market analysis, that the awardee is a regular dealer of plasma arc welding systems. The record also indicates that, after award, Hobart submitted an affidavit attesting to the fact that it is a regular dealer.

Battelle's determination of Hobart's status is in accord with Federal Acquisition Regulation (FAR) § 22.608-2(b)(3), which requires contracting officers to investigate the Walsh-Healey certification of offerors if, as is indicated here, the acquisition office has not previously awarded a contract to that offeror. See The Pratt & Whitney Co., Inc.; Onsrud Mach. Corp.--Reconsideration, B-232190.3; B-232190.4, Sept. 27, 1989, 89-2 CPD ¶ 275. The primary responsibility for determining if an offeror qualifies as a manufacturer or regular dealer rests with the contracting officer. FAR § 22.608-2(a). All available factual evidence essential to an eligibility determination may be considered. FAR § 22.608-2(d). Therefore, Hobart's failure to indicate whether it was a regular dealer was immaterial because, under the FAR, the contracting agency may substitute its determination for an offeror's certification of its legal status under the Walsh-Healey Act.

To the extent that Merrick questions Hobart's status as a regular dealer, this Office will not review the legal status of a firm as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(9) (1990). This matter is to be decided by the contracting agency in the first instance, subject to review by the Small Business Administration where a small business is involved, and the Secretary of Labor. The Pratt & Whitney Co., Inc.; Onsrud Mach. Corp., B-232190; B-232190.2, Dec. 13, 1988, 88-2 CPD ¶ 588. In this regard, the record indicates that Merrick has filed an appeal with the Secretary of Labor.

Additionally, contrary to Merrick's contention, the failure to properly complete the Walsh-Healey Act certification is not a matter of responsiveness; rather, errors and omissions in completing the certification are minor defects which may be corrected any time prior to the award of the contract. Alpha Q., Inc., B-234403.2, Oct. 31, 1989, 89-2 CPD ¶ 401. Moreover, the concept of responsiveness is not technically applicable here because Battelle conducted a negotiated procurement. See International Filter Mfg. Corp., B-235049, June 21, 1989, 89-1 CPD ¶ 586.

Merrick also contends that Hobart will not provide new equipment under the contract because Merrick is the only authorized distributor of Plasmafix 50E equipment in the United States. The question whether Hobart will perform as required under the contract is a matter of contract administration and is not for consideration by our Office. See 4 C.F.R. § 21.3(m)(1); Motorola, Inc., B-234773, July 12, 1989, 89-2 CPD ¶ 39. In any event, Battelle has advised DOE that the equipment acquired from Hobart will be new and will conform to the RFP's specification requirements.

The protest is denied in part and dismissed in part.



for
James F. Hinchman
General Counsel