



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lock Corporation of America

File: B-238886

Date: July 5, 1990

Ronald L. Levin for the protester.
Herbert Liebman for A.L. Liebman & Son, Inc., an interested party.
Michael E. Wyant, Federal Prison Industries, Inc., for the agency.
Jacqueline Maeder, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office sustains protest of low small business bidder which did not receive an award because the contracting agency did not think it "prudent" to contract with the firm whose prior contract for the same item had been terminated because of unsatisfactory performance. Although not denominated as such, the agency's action was a determination of nonresponsibility which by statute must be referred to the Small Business Administration for consideration under the certificate of competency procedure.

DECISION

Lock Corporation of America (LCA) protests the award of a contract to A.L. Liebman & Son, Inc. issued by UNICOR, Federal Prison Industries, Inc. (FPI), Department of Justice, under invitation for bids (IFB) No. 16-PI-245-0, for the acquisition of flat key locks with two keys and brass deadbolts. The locks are a component of lockers which are built by prison inmates and sold by FPI to other federal agencies. LCA argues that, as the low bidder, it should have been awarded the contract.

We sustain the protest because the failure to award to LCA was in effect based on a finding that LCA was nonresponsive, and thus should have been, but was not, referred to the Small Business Administration (SBA) under its certificate of competency (COC) procedures.

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The IFB, issued on January 2, 1990, contemplated a requirements-type contract for 1 year with four 1-year options. Estimated quantities were for 5,000 locks on a monthly basis or 60,000 on a yearly basis. Award was to be made to the responsible bidder whose bid, conforming to the solicitation, would be most advantageous to the government considering only price and the price-related factors specified in the solicitation.

Three bids were received by the February 21 bid opening date and award was made to Liebman on the following day. Liebman bid \$1.283 per lock; LCA bid \$1.15 per lock. LCA certified that it was a small business concern.

In its protest letter, LCA notes that it had a contract with FPI for the same item which was terminated on November 13, 1989. The termination letter issued by the agency indicates that the contract was terminated "due to failure in delivery performance." LCA states in its protest that "[p]roduction changes have been instituted to ensure on time deliveries" and requests, therefore, that it be awarded the contract as the low bidder.^{1/}

In response, the agency reports that the contracting officer determined that it was "not prudent" to award to LCA because of its poor performance and delivery record. To support its decision, the agency included in its report a sampling of rejection notices documenting the poor record exhibited by the protester. Indeed, the record discloses a pattern of unsatisfactory delivery and performance, including keys that would not turn in the locks or broke off in the locks, deadbolts that did not fit through the opening in the lock bar, and locks that did not open with the correct key, close after opening, or operate smoothly. One rejection report noted a rejection rate of 18 percent which was attributed to "careless and inattentive manufacturing procedures."

The agency argues that, given this record, the contracting officer did not want to risk facing a non-delivery situation or the delivery of unacceptable goods. Therefore, the agency decided to award the contract to a contractor, other than the

^{1/} Additionally, LCA alleges that Liebman is offering a "foreign made item." Indeed, Liebman's bid indicates that it will supply locks made in England. We note, however, that acceptance of a foreign-made product is not prohibited by the solicitation. Therefore, offering a foreign product does not preclude an award to Liebman, it merely results in the application of a differential in the evaluation of bids. In this instance, the application of this differential does not change the standing of the bidders.

low bidder, who had "stepped in previously when LCA has failed to supply quality products on time." The agency says that it "would not have awarded the contract to LCA based on its poor performance for supplying quality locks."

In its report on the protest, the agency does not characterize the contracting officer's determination as one concerning the responsibility of LCA. In fact, the agency states that the protester has not raised the issue that a nonresponsibility determination was made and says it is unsure if "this issue merits discussion."

As the low bidder under this sealed-bid solicitation, LCA was in line for the award of this contract, provided that the contracting officer affirmatively determined it to be responsible, which is a prerequisite to any award. Federal Acquisition Regulation (FAR) § 9.103 (FAC 84-18). In determining the responsibility of a prospective contractor, two standards to be considered are the contractor's ability to comply with the required or proposed delivery or performance schedule and its performance record. FAR §§ 9.104-1(b) and (c) (FAC 84-18). Although not labeled as such, the contracting officer's determination not to contract with LCA because its prior contract was terminated for unsatisfactory performance amounted to a negative responsibility determination.

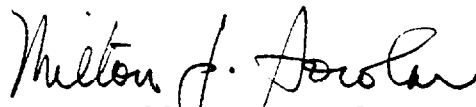
Under the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1988), and the implementing FAR §§ 19.602-1 (FAC 84-51) and 9.103(b) (FAC 84-18), no small business may be precluded from the award of a contract based solely on a contracting officer's nonresponsibility determination without referral of the matter to the SBA for a COC review. The SBA has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business bidder's responsibility by issuing or declining to issue a COC. 15 U.S.C. § 637(b)(7)(A); Marlow Servs., Inc., 68 Comp. Gen. 390, (1989), 89-1 CPD ¶ 388.

In this case, there is no indication in the record that the agency submitted the nonresponsibility determination to the SBA for review. Indeed, FPI seems to rely on the premise that the agency is not required to refer its determination to the SBA in situations where a prospective contractor cannot meet "quality control standards and provide a defect free item." In support of its position, FPI cites Environmental Technologies Group, Inc., B-237325, Jan. 24, 1990, 90-1 CPD ¶ 101. The facts in Environmental Technologies, however, are

distinguishable from the situation here. First, the solicitation protested in Environmental Technologies involved a request for proposals which set forth specific quality assurance requirements. The protester was eliminated from competition because in its proposal it had refused to commit itself to meet these requirements. Therefore, its proposal's technical acceptability, rather than the firm's responsibility, was at issue. Here, the IFB set forth no specific technical or quality assurance requirements; rather, the record clearly reflects that the agency simply doubted the protester's general ability to perform, i.e., its responsibility. Under these circumstances, the law, as stated previously, requires that the agency request a SBA review of LCA's ability to provide the product required by the IFB. The agency's rejection of LCA's bid without referral to the SBA was unreasonable and tantamount to arbitrary and capricious action. Oceanside Moving and Storage, B-218075.2, May 23, 1985, 85-1 CPD ¶ 591.

FPI has not accepted delivery of any locks under Liebman's contract. Therefore, we recommend that the contracting officer refer this matter to the SBA. If the SBA issues a COC, the current contract awarded to Liebman should be terminated for the convenience of the government and award made to LCA. See Oceanside Moving and Storage, B-218075.2, supra. If a COC is not issued, no further action is required. Id. In any event, we find that LCA is entitled to recover its protest costs. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

for 
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