



Comptroller General
of the United States

Washington, D.C. 20548

1237510

Decision

Matter of: Balimoy Manufacturing Company of Venice, Inc.

File: B-253287.2; B-253287.3

Date: October 5, 1993

Kenneth A. Martin, Esq., Elliott, Vanaskie & Riley, for the protester.

Robert A. Damoiseau for Aerosonic Corp., an interested party.

Vera Meza, Esq., and Susan Allison-Hiebert, Esq., Department of the Army, for the agency.

Jennifer D. Westfall, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest objecting to agency decision to make partial award under an invitation for bids (IFB) to other than the low bidder is dismissed as untimely where it was clear on the face of the solicitation that despite its denomination as an IFB, the agency intended to consider factors other than price in selecting an awardee or awardees, and protester failed to protest the discrepancy prior to award.

DECISION

Balimoy Manufacturing Company of Venice, Inc. protests the award of a contract to Aerosonic Corporation under invitation for bids (IFB) No. DAAA09-93-B-0212, issued by the Department of the Army Armament, Munitions, and Chemical Command for M864 base assemblies. The Army awarded a contract for 50 percent of the requirement to Balimoy and a second contract, for the remaining 50 percent, to Aerosonic. Balimoy contends that since its price for the entire quantity was lower than the split award price, it should have received the entire award.

We dismiss the protest.

The solicitation, although denominated an IFB, provided for award based on price and other factors, including mobilization base consideration, contractor capacity, and premium cost. Offerors were asked to furnish unit prices, with and without first article testing, for six alternative

quantities, representing 30, 70, 50, 40, and 60 percent of the total quantity to be procured, with award to be made either to one offeror for 100 percent of the quantity; to two offerors for 50 percent of the quantity each; to one offeror for 30 percent of the quantity and to another for 70 percent; or to one offeror for 40 percent of the quantity and to another for 60 percent.

Competition under the solicitation was restricted to mobilization base producers of the M864 base assemblies, which consisted of 3 firms: Balimoy, Aerosonic, and Olin/Flinchbaugh. All three submitted bids by the April 16, 1993 opening date. Olin's prices were considered excessive and were excluded from further consideration. The contracting officer determined the cost to the government of the various award combinations as follows:

<u>Percent</u>	<u>Contractor</u>	<u>Total Cost</u>	<u>Premium</u>
30	Aerosonic	\$9,577,783	\$361,303
70	Balimoy		
50	Aerosonic	\$9,556,520	\$340,040
50	Balimoy		
40	Aerosonic	\$9,547,898	\$331,418
60	Balimoy		
100	Balimoy	\$9,216,480 ¹	---

Although award to Balimoy for the entire quantity thus represented the lowest cost alternative, the contracting officer recommended dividing the award evenly between Balimoy and Aerosonic based on the following considerations:

- Dual awards would keep both bases "warm."
- Dual awards would keep both manufacturers in business, thereby increasing the likelihood of price competition on future acquisitions.
- Dual awards would maintain both manufacturers at approximately their current production rates and at rates within their planned mobilization rates;

¹Although Aerosonic's unit price for the 100 percent quantity of \$45.44 was lower than Balimoy's price of \$47.69, its evaluated price was higher since the solicitation provided for the addition of a 10 percent differential to the prices offered by firms which are not small disadvantaged business concerns.

they also would allow for surge capability for both if required.

On May 27, 1993, the agency awarded a contract to Aerosonic for 50 percent of the requirement at a unit price of \$48.50 and a contract to Balimoy for the remaining 50 percent at a unit price of \$50.43.

Balimoy protests the award to Aerosonic, arguing that since its own price for 100 percent of the quantity was lower than the split award price, it should have received the entire award. The protester contends that since the solicitation was denominated an IFB, the agency was required to award based exclusively on price and price-related factors.

Although the solicitation at issue here was identified as an IFB, it clearly stated in section M that in selecting an awardee or awardees, the agency would consider price and other factors, including mobilization base consideration, contractor capacity, and premium costs. Thus, competitors were clearly placed on notice that price would not be the only factor considered in the award decision. To the extent that the protester now raises the inconsistency between labeling the solicitation an IFB and providing for the consideration of factors other than price in the evaluation, it should have protested the discrepancy to our Office prior to bid opening since our Bid Protest Regulations require that protests based on improprieties which are apparent on the face of a solicitation be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1993); Recon Optical, Inc., B-232125, Dec. 1, 1988, 88-2 CPD ¶ 544.

The protester contends that it did not perceive the solicitation to be internally inconsistent--and thus did not protest the inconsistency prior to bid opening--because it presumed that mobilization base consideration was a price-related factor. The protester offers no explanation--and we fail to comprehend--how mobilization base consideration could influence the evaluation of price, however. Moreover, even assuming that the protester could reasonably have viewed mobilization base consideration as a price-related factor--and thus not have perceived the agency's inclusion of it as a factor to be considered in the selection of an awardee or awardees as inconsistent with the solicitation's denomination as an IFB--it was surely placed on notice by the solicitation's reference to premium costs that the agency might award a portion of the requirement to other than the lowest-priced firm.

The protester further argues that the Army's assertion that it elected to split the award in order to keep two bases "warm" is clearly a pretext since the President's budget for fiscal year (FY) 1994 included no funding for the M864 baseburner program; thus, according to the protester, no mobilization base will exist for the item after October 1, 1993.

We think that the protester's argument is premature; until the Department of Defense appropriations act for FY 1994 has been enacted, it is unclear whether or not it will include funding for the M864 baseburner program. Furthermore, even if no funding is ultimately appropriated for the program for FY 1994, we fail to see how this demonstrates that there was no need to protect the mobilization base to ensure the availability of the item in the event of a national emergency during FY 1993.

Finally, in supplemental comments filed with our Office on September 24, the protester argues that the Army did not need to make a partial award to Aerosonic in order to maintain two viable restricted specified base producers since the mobilization base for the item also included Olin/Flinchbaugh, a very large and secure producer.

This argument is untimely. The Army noted in its report, filed with our Office on June 25, that it had split the award in order to maintain two viable producers to support the mobilization base and ensure their availability in the event of a national emergency. To the extent that the protester wished to object to this decision on the grounds that two viable producers (i.e., Balimoy and Olin/Flinchbaugh) would remain even if Aerosonic did not continue to manufacture the item, it should have raised the argument within 10 days after its receipt of the agency report. 4 C.F.R. § 21.2(a)(2) (protest not based on solicitation impropriety must be filed within 10 days after the basis for protest is known.)

The protest is dismissed.

Christine S. Melody
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