



Comptroller General
of the United States

Washington, D.C. 20548

150311
10312210

Decision

Matter of: American Material Handling, Inc.

File: B-253818; B-253819

Date: October 26, 1993

A. Sid Goss for the protester.

Ronald M. Pettit, Esq., Defense Logistics Agency, for the agency.

Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Company may not change an offer submitted in its own name after the closing date to make itself only the agent of another company since award to an entity other than that named in the original offer is improper.

DECISION

American Material Handling, Inc. protests the rejection of its low-priced proposals, which it asserts it submitted as an agent for Edelen & Boyer Company (E&B) under request for proposals (RFP) Nos. DLA730-93-R-7041 (No. 7041) and DLA 730-93-R-7003 (No. 7003), issued by the Defense Construction Supply Center (DCSC) for motorized rollers. DCSC rejected both proposals because American is not a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1988), and improperly submitted the proposals in its own name. American contends that its listing itself as the offeror was a clerical error which it should be permitted to correct.

We deny the protests.

In its offer submitted under RFP No. 7003, American identified itself as the offeror and its president signed the proposal. In addition, American made a negative contingent fee representation and represented that it was a "regular dealer" under the Walsh-Healey Act. That Act requires that all contracts for the manufacture or furnishing of materials, supplies, articles, and equipment, in any amount exceeding \$10,000, shall be with manufacturers or regular dealers. The agency found that American did not

qualify as a regular dealer under Federal Acquisition Regulation (FAR) § 22.606-2 and was ineligible for award.¹

After American was advised that it did not qualify as a regular dealer, American attempted to change its offer to indicate that it was an agent for E&B. American submitted a letter from E&B, dated February 25, 1993, stating that American was its "authorized representative agent," and that E&B "assure[s] an uninterrupted source of supply for the items being offered by [American] for the above solicitation and other contracts."

As noted above, however, American submitted the offer in its own name and its president signed the proposal. Also, American's proposal did not identify American as an agent and did not identify a principal. DCSC determined that American could not amend its offer to act as an agent for E&B and notified the protester of this determination. In spite of this notification, American submitted an incomplete standard form (SF) 119, "Statement of Contingent or Other Fees," in a further attempt to qualify as an agent for E&B. Among other things, the form was not signed or dated by the alleged principal, E&B.

The only other proposal submitted under RFP No. 7003 included a price which the agency considered to be excessive. As a result, and because American was ineligible for award, DCSC determined that it was in the government's best interest to obtain the rollers through the exercise of an option on an existing contract for identical items. Therefore, the agency canceled RFP No. 7003.

The facts under RFP No. 7041 are similar. However, while American identified itself as the offeror in its proposal submitted under this solicitation, in the standard contingent fee provision of its proposal, American represented that "[t]he offeror" had retained a company to solicit or obtain this contract and wrote in the margin of its proposal: "[American] Authorized agent for Edelen & Boyer Co. U.S. Fed. Govt. Sales." In addition, American's

¹In order to qualify as a regular dealer under FAR § 22.606-2, an offeror must, among other things, have an establishment or leased space in which it regularly maintains a stock of supplies, the stock of supplies must be a true inventory from which sales are made, and the supplies stocked must be of the same general character as those to be supplied under the contract. Here, DCSC found that American does not maintain an inventory of any type. Rather, items sold by American are shipped from the manufacturer to the customer.

proposal represented that it was not a regular dealer or a manufacturer under the Walsh-Healey Act.

By letter dated June 3, American asked DCSC to allow amendment of its proposal to show E&B as the principal. American submitted a copy of the February 25 letter from E&B, which was submitted under RFP No. 7003, stating that American was an "authorized representative agent" of E&B. DCSC notified American that it could not amend its proposal to show E&B as the principal because American's proposal indicated that it intended to submit the offer on its own behalf.

American argues that it should be awarded contracts under both RFPs. Concerning RFP No. 7003, while American concedes that it is not a regular dealer under the Walsh-Healey Act, the protester argues that it is an agent for E&B and protests the contracting officer's decision not to permit American to change its status to authorized agent rather than regular dealer. American also alleges that the cancellation of the solicitation was "a deliberate and discriminating practice . . . against [American]."

As for RFP No. 7041, American argues that its proposal stated that American is an agent for E&B and that DCSC should permit it to change the offeror's name in its proposal from American to E&B. American states that no one from DCSC explained how to complete the proposal forms and that FAR § 3.405(b)(2) allows the correction of minor irregularities concerning completion of the contingent fee representation contained in an offer. According to American, it has been permitted to make these modifications under other solicitations and, since DCSC has not allowed it to do so, American maintains that DCSC is deliberately discriminating against the protester.

Since American is not a manufacturer or regular dealer under the Walsh-Healey Act, it was ineligible for award based on the proposals it submitted under each of the RFPs. In addition, DCSC properly rejected American's attempts under both RFPs to change its status after the date set for receipt of proposals. FAR § 22.607 provides that a manufacturer or regular dealer may bid, negotiate, and contract through an authorized agent only if the agency is disclosed and the agent acts and contracts in the name of the principal. American did not identify itself as an agent in its offer under RFP No. 7003 and listed itself as the offeror. Similarly, although American identified itself as an "authorized agent" under RFP No. 7041, the protester listed itself as the offeror. Additionally, the president of American signed both offers.

Although American argues that it should be permitted to correct the representations in its proposals as minor informalities under FAR § 3.405(b)(2), essentially what American seeks is the opportunity to submit new offers, substituting its principal for itself as the offeror and manufacturer. However, an award to an entity other than that named in the original offer is improper; substitution of one firm for another that has submitted an offer is not allowed because of the need to avoid offers from irresponsible parties whose offers could be avoided or ratified by the real principals as their interests might dictate. American Material Handling, Inc., B-252968; B-253205, Aug. 10, 1993, 93-2 CPD ¶ 89; KB Indus.--Recon., B-244120.2, June 14, 1991, 91-1 CPD ¶ 570; Worldwide Parts, Inc., B-244733, Aug. 15, 1991, 91-2 CPD ¶ 156. Thus, allowing American to make such a change would result in an improper substitution of firms. In short, once American submitted offers in its own name, it could not change the offers after the closing date to substitute another entity as the real party in interest.

Finally, there is no evidence that DCSC discriminated against American by canceling RFP No. 7003 or by refusing to allow American to modify the terms of its proposals. The agency canceled RFP No. 7003 because American was ineligible for award and the only other proposal included a price which was significantly higher than the price available under an option under another contract. There is no evidence that DCSC canceled the solicitation merely to prevent American from receiving an award. In addition, the fact that American has improperly completed its proposal forms on several recent DCSC solicitations and DCSC has properly determined that American is ineligible for award because of these errors does not establish that DCSC has discriminated against the protester.

Accordingly, the protests are denied.


 for James F. Hinchman
 General Counsel