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Matter of: Fischbach and Moore International Corporation

File: B-254225

Date: December 2, 1993

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DIGEST

In a procurement covered by the Percy Amendment, 22 U.S.C. § 302 (1988), protest of the agency's finding that the awardee, a foreign firm, is eligible for award under that statute is denied where the agency has presented support for its finding and the protester has proffered no evidence which calls into doubt the reasonableness of that finding.

DECISION

Fischbach and Moore International Corporation (FMIC) protests the award of a contract to Obayashi Corporation under request for proposals (RFP) No. SFBO-AD-93-R0034, issued by the Department of State. FMIC contends that Obayashi is ineligible for award.

We deny the protest.

On December 9, 1992, the Department of State's Office of Foreign Buildings Operations published a notice in the Commerce Business Daily (CBD), advising that the agency required general construction contractor services for renovation of the residence of the U.S. Ambassador in Tokyo. The notice stated that "[p]rospective offerors must meet the prequalification requirements set forth below prior to receiving a Solicitation Package," listed five

prequalification requirements, and provided that the solicitation package would be issued only to those firms which met the prequalification requirements.

The CBD notice also stated that the Foreign Service Buildings Act applied to this procurement, and that the statute "limits competition to (1) American-owned offerors and (2) offerors from countries which permit or agree to permit substantially equal access to American [b]idders for comparable diplomatic and consular building projects." See 22 U.S.C. § 302 (1988).[1]

On January 26, 1993, the agency prequalified 10 firms for the procurement, including 8 U.S. firms and 2 Japanese firms. The prequalified firms, including both FMIC and Obayashi, apparently received a copy of the list of all prequalified firms on January 26; that list made no reference to the Percy Amendment requirements, and gave no indication that the listed firms had been found to have satisfied those requirements. Each of the prequalified firms was sent a copy of the RFP.

The RFP incorporated in full a standard Department of State solicitation clause including the following language:

> "The Government intends to award a fixed-price construction contract . . . to the responsible Offeror whose offer conforming to the solicitation requirements will be most advantageous to the Government, cost or price and other factors considered . . . ."

The RFP also incorporated another standard agency solicitation clause, entitled "Review of Proposals," which stated that:

> "The Government shall review responsive Proposals from a standpoint of price (taking into account any applicable preferences for U.S. Contractors), demonstrated technical capabilities and prospective ability to perform, and shall take into account the prior performance of the Offeror on similar projects."

On February 19, the agency issued an amendment to the RFP. Among other things, the amendment stated that it was intended to "clarify the Percy Amendment." The amendment added to the RFP the CBD notice language regarding the

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[1]This provision, the relevant statutory text of which is set forth below, is referred to as either the Percy Amendment or Section 11 of the Foreign Service Buildings Act.

limitation of competition to American-owned offerors and offerors from countries which permit or agree to permit substantially equal access to U.S. firms for comparable diplomatic and consular projects.

Three proposals were received. No technical proposals were submitted; except for various standard solicitation provisions (such as mandatory representations and certifications), the proposals only addressed price. Thus, FMIC's proposal consisted of 5 pages of pricing data; a 1-paragraph statement regarding Japanese taxes included in the proposed price; a 6-line set of small and minority business contracting goals; 6 lines of information concerning insurance coverage; a bid bond; and 14 pages of a standard agency list of representations and certifications.

Brief negotiations were conducted, after which each of the three offerors submitted a best and final offer (BAFO) by the April 30 due date. FMIC's BAFO consisted of a single page addressing only the offeror's price.

Obayashi's BAFO price, $7,143,157, was low; FMIC's BAFO price of $10,259,823 was next low. Because one provision of the Percy Amendment, 22 U.S.C. § 302(b)(2), mandates that the price proposed by U.S. offerors be reduced by 10 percent for evaluation purposes, the agency evaluated FMIC's price as $9,233,841. The agency viewed price as the sole evaluation criterion and therefore concluded that Obayashi's proposal was in line for award. On June 25, the contracting officer made an affirmative determination of responsibility for Obayashi. Upon review of that determination, and apparently because a non-U.S. firm was in line for award, agency counsel suggested that the contracting officer "also confirm in writing his determinations relative to [the Percy Amendment]." On July 12, the contracting officer responded with a memo stating in pertinent part as follows:

> "No information is available which would indicate that Japan prohibits American owned bidders from bidding on similar diplomatic projects. The project was synopsized in [the CBD]. Nine American [b]idders . . . and two Japanese bidders . . . were prequalified. A pre-proposal conference was held on February 3-4, 1993 in Tokyo. All prequalified firms were present.
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> "The presence of [Obayashi] at the pre-proposal conference and their participation in this project from the outset was known to all competitors. No objection was raised by any of [Obayashi's] competitors about their participation in this project.

> "As the Department of State has no mechanism to verify [whether bidders' countries permit or agree to permit substantially equal access to American bidders for comparable diplomatic and consular building projects], we must rely on the industry. As of this date, there is no reason to suspect that the Japanese discriminate against American bidders on similar diplomatic projects."

Award was made to Obayashi on July 19. This protest followed on July 23.

FMIC first contends that Obayashi is ineligible for award under the Percy Amendment. The protester argues that, "given the clear pattern of discrimination against United States businesses in the award of Government of Japan construction contracts, the prequalification of a Japanese-owned firm for this work is inconsistent with the [Percy Amendment]." FMIC claims that this assertion is supported by a finding of the United States Trade Representative (USTR) that the Japanese government discriminates against U.S. and other non-Japanese firms seeking to bid on public projects in Japan. FMIC further contends that, in light of this finding by the USTR, the Department of State was required to undertake an investigation regarding the practices of the government of Japan in diplomatic and consular construction and could not properly wait passively for private parties to step forward to object to participation of Japanese firms in the competition.

The Percy Amendment, 22 U.S.C. § 302, was enacted in 1983 and provides in pertinent part as follows:

> **"(a) Eligibility limitation for construction, etc., abroad**
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> "Eligibility for award of contracts under this chapter or of any other contract by the Secretary of State, . . . the purpose of which is to obtain the construction, alteration, or repair of buildings and grounds abroad, when estimated to exceed $5,000,000, . . . shall be limited, after a determination that adequate competition will be obtained thereby, to (1) American-owned bidders and (2) bidders from countries which permit or agree to permit substantially equal access to American bidders for comparable diplomatic and consular building projects except that participation may be permitted by or limited to host-country bidders where required by international agreement or by the law of the host country or where determined by the Secretary of State to be necessary in the interest of bilateral

relations or necessary to carry out the construction project.

"(b) Foreign laws and regulations; competitive status and adequacy; bidder qualifications

. . . . .

"(4) Bidder qualification under subsection (a) of this section shall be determined on the basis of nationality of ownership, the burden of which shall be on the prospective bidder. Qualification under subsection (a)(1) of this section shall require evidence of [specified indicia of the bidder's being an American-owned firm].

"(5) Qualification under this section shall be established on the basis of determinations at the time bids are requested.

. . . . .

"(d) Discretionary determinations by Secretary of State

"Determinations under this section shall be committed to the discretion of the Secretary of State."

We first discuss the timeliness of the protester's challenge to the agency's finding that, consistent with the Percy Amendment, Japanese firms were eligible for award under this procurement. The agency argues that this protest ground should be dismissed as untimely, because the protester has known since January 26 that the agency had prequalified Obayashi.

Our Bid Protest Regulations provide that protests other than those based upon alleged improprieties in a solicitation must be filed not later than 10 days after the basis of protest is known, or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1993). Because FMIC's protest is not based on an alleged impropriety in the RFP, the protest is timely unless we conclude both that the agency had reached a conclusion regarding the applicability of the Percy Amendment to Japanese firms more than 10 days before the protest was filed on July 23, and that by that time FMIC knew or should have known of the agency's conclusion.

The Department of State bases its timeliness argument on the assumption that the January 26, 1993, list of prequalified offerors constituted a Percy Amendment finding and that, since FMIC knew that Obayashi had been prequalified, FMIC also knew that the agency had concluded that Obayashi was eligible under the Percy Amendment. The agency points out that the protester understood the January 26 prequalification to mean that the agency had reached such a conclusion. FMIC's initial protest contended that "the prequalification of a Japanese-owned firm for this work is inconsistent with the [Percy Amendment]." Notwithstanding the protester's understanding, the earliest indication that the agency actually decided that Japanese companies were eligible for award under the Percy Amendment is the contracting officer's July 12 memorandum, dated fewer than 10 working days before the protest was filed and first released to the protester with the agency report on the protest. On the record before us, this was the first time that the Department of State held that the offeror was eligible for award under the Percy Amendment.

The prequalification criteria in the CBD notice referred to the offeror's construction experience, knowledge of U.S. construction standards, and financial capability--not to the provisions of the Percy Amendment. Moreover, the agency issued an RFP amendment to all prequalified offerors in February clarifying the Percy Amendment provisions, which clearly suggests that the offerors' eligibility under those provisions had not yet been determined. While FMIC described its protest as a challenge to the January 26 prequalification decision, that prequalification did not provide a basis to protest the eligibility of Obayashi. We find FMIC's protest timely because it was filed within 10 days after the agency actually determined the awardee's eligibility.

Regarding the merits of this protest ground, FMIC contends that the Department of State's determination that a Japanese firm was eligible for prequalification and award under the Percy Amendment was unreasonable because of the USTR's identification of Japan as a country which discriminates in its public construction procurements. In light of the USTR's finding, FMIC asserts that the agency could not reasonably award to Obayashi without first undertaking an "investigation" of the conduct of the government of Japan in diplomatic and consular construction projects. FMIC does not describe what such an investigation should have entailed. In fact, the protester seems to believe that the Department of State should have assumed that the findings of the USTR concerning the discriminatory practices of the Japanese government in construction projects within Japan also applied to construction projects outside Japan (which would include Japan's diplomatic and consular construction).

Contrary to FMIC's assertion, the record supports the reasonableness of the agency's finding and there is no basis to presume that further inquiry would have led to a different conclusion. The only evidence proffered by the protester is the USTR's finding that the government of Japan discriminates against U.S. firms in domestic public construction projects. That finding is expressly limited to construction projects in Japan, and the USTR's office has confirmed in writing that no objection was ever raised to Japan's diplomatic and consular building practices in any of the comments received in response to the USTR's request for submissions concerning discrimination against U.S. firms. The fact that Japan discriminates against U.S. firms in its domestic construction projects does not establish that Japan discriminates with respect to overseas projects. FMIC has produced no evidence--statistical, anecdotal, or otherwise--suggesting that Japan fails to permit U.S. firms equal access in diplomatic and consular construction. In support of its conclusion that U.S. firms have had access to Japanese diplomatic and consular projects, the Department of State points out, and FMIC does not dispute, that U.S. firms built both the embassy of Japan and the residence of the Japanese ambassador in Washington, D.C.

The protester is correct that the Department of State did not conduct any investigation of whether the government of Japan affords equal access to American bidders for comparable diplomatic and consular building projects, and it is also clear that the agency had no systematic process in place to obtain or verify such information.[2] While this may not reflect adequate attention to the Percy Amendment, as explained above there is no reason to believe that such an investigation would have altered the agency's award determination. Since the evidence of record supports the correctness of the agency's conclusion, and the protester has failed to present any credible evidence to the contrary, we have no basis to object to the award to Obayashi.[3]

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[2]There is no specific provision in the statute, nor is there evidence in the language of the legislative history of the Percy Amendment, that the Department of State was required to conduct an investigation. See 129 Cong. Rec. 25,372 (1983) (statement of Sen. Percy).

[3]FMIC also challenges the authority of the contracting officer to make the finding regarding the eligibility of Japanese offerors under the Percy Amendment. Since the record supports the agency's conclusion, we need not consider this allegation as it pertains only to a procedural matter which did not harm the protester. See Caltech Serv. Corp., B-250784.2, B-250784.3, Feb. 4, 1993, 93-1 CPD ¶ 103; The Entwistle Co., B-249341, Nov. 16, 1992, 92-2 CPD ¶ 349.

As its other ground of protest, FMIC contends that the agency, in treating price as the sole award criterion, departed from the RFP evaluation criteria. FMIC argues that the RFP identified, in the provision entitled "Review of Proposals," other evaluation criteria in addition to price: namely, demonstrated technical capabilities, prior performance on similar projects, and prospective ability to perform.

While, as noted above, the RFP included a standard Department of State evaluation clause stating that award would be made upon consideration of "cost or price and other factors," the RFP did not identify any "other factors." The standard solicitation language entitled "Review of Proposals" simply stated generally that the agency would review offeror experience, demonstrated technical capabilities and prospective ability to perform. All of these areas concern the offeror's capacity to perform and are normally reviewed in the context of a responsibility determination. The RFP did not identify these factors as evaluation criteria, and offerors were not asked to include information bearing on them in their proposals. The only reasonable reading of the RFP is that information on these areas could be obtained during the course of a pre-award survey conducted for the purpose of ascertaining the prospective awardee's responsibility. Because the solicitation did not specify any evaluation criteria other than price, the agency properly considered price to be the sole award criterion. See, e.g., Blane Corp., B-234887, Apr. 24, 1989, 89-1 CPD ¶ 403. Thus, we find no merit to this protest ground.[4]

The protest is denied.

James F. Hinchman
General Counsel

[4]We note that FMIC itself evidently did not understand the RFP as establishing technical evaluation criteria, because its proposal contained only price-related material, with no reference to the company's experience, technical capabilities, or prospective ability to perform.