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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-189794

DATE: February 9, 1978

MATTER OF: International Harvester Company

DIGEST:

1. In two-step procurement, bid protest relating to issues of responsiveness known and raised by protester and decided by agency at time of step one of procurement, are untimely when filed with GAO after award of contract to lowest second step bidder.
2. Where solicitation merely requires that truck offered satisfy safety regulation and proposal takes no exception to requirement, no basis exists to question acceptability of proposal.
3. GAO will not review protests concerning affirmative determinations of responsibility unless there are allegations of fraud or failure to meet definitive criteria of responsibility. Product experience clause contained in solicitation established requirement for offering commercially proven components and was not a definitive requirement for bidder responsibility.

International Harvester Company (IH) has protested the award of a contract for the manufacture of commercial trucks to AM General Corporation (AM General) under solicitation No. DAAE-07-77-B-0042 by the U.S. Army Tank-Automotive Materiel Readiness Command (TARCOM) on the grounds that AM General is not a responsible bidder, and that its bid was not responsive.

The contract involved herein was solicited under a two-step procurement. The step one request for technical proposals was issued to all potential offerors on January 10, 1977. On January 17, 1977, a pre-proposal conference was held to explain the program

B-169794

objectives and answer the offeror's questions. Step one technical proposals were received on April 4, 1977. AM General's technical proposal was based upon a Crane Carrier Corporation (CCC) Centaur I truck type. The proposal disclosed a licensing agreement between AM General and CCC which permitted AM General to manufacture and market that truck to the Government.

Subsequent to discussions with each of the offerors, the six proposals submitted were considered to be technically acceptable. On May 27, 1977, step two solicitations were issued to the offerors. A public bid opening was held on June 23, 1977. AM General was the low bidder at \$251,657,000; IH was the second lowest bidder at \$256,445,000. As a result of AM General submitting the lowest bid price, its bid being determined responsive, and the contracting officer's determination of responsibility, award was made on July 28, 1977.

Prior to issuance of step-two proposals, on May 11, 1977, IH had raised the issue of AM General's status as a commercial manufacturer in a letter to TARCOM. IH wrote that:

"The reason for this correspondence is that it is our understanding that you have accepted a Step I proposal from A. M. General Corporation. We do not understand how this Corporation can bid prime when they do not have a commercial product or Heavy Duty Truck Dealer or Sales Organization. Some of the questions we ask ourselves, and some I'm sure you are asking, we have listed below: * * *."

IH questioned AM General's commercial experience and sales organization, criticized its arrangement with CCC, asked whether AM General had certified its product to current federal safety regulations, and noted that AM General had not previously manufactured the vehicle offered.

On May 16, 1977, the contracting officer replied to these questions, stating:

"The product experience qualification restricts this procurement to offerors proposing to supply current standard commercial trucks. It has as its objective, as you appreciate and indicated in your opening paragraph, the furnishing of a commercially designed and tested product.

"It does not constrain nor otherwise limit, however, participation to only those offerors who are or have been the manufacturers of the commercial trucks being offered. Importantly, for the purpose of Step One acceptability, it is the product, not the offeror, that must be qualified. In our judgment so long as AMG Corp. offers vehicles meeting the product experience qualification criteria, as called out in Attachment A, paragraph B.2, its technical proposal, from that standpoint, is acceptable." (Emphasis supplied.)

IH took no action when TARCOM advised that AM General's step-one technical proposal was acceptable, and the firm did not protest until after the opening, when AM General was determined to be the lowest bidder.

Among its items of protest to this Office, IH raises issues which previously had been stated in its May 11 letter to TARCOM. It protests that AM General is not the manufacturer of the vehicle and that AM General offers a truck manufactured by CCC. The protester argues that AM General should not be permitted to rely upon CCC as its "subcontractor" to meet the experience requirement of the solicitation.

These protests all relate to IH's interpretation of, and AM General's compliance with, the product experience clause. These issues were apparent from its May 11 letter to TARCOM. In its reply, TARCOM had clearly informed IH that the product, and not the offeror, must be qualified and that AM General was not precluded from offering another's product line meeting the experience qualification criteria. By restating these items in its protest to GAO, IH is now attempting to have GAO concur in its interpretation of the product's experience clause despite the previous adverse agency action.

B-189794

Accordingly, these protests are untimely under section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. § 20.2(a), which requires that where a protest is initially filed with an agency, any subsequent protest to GAO must be filed within ten days of adverse agency action. Since IH did not protest within ten days of receipt of the May 16 letter from TARCOM, stating that the solicitation did not limit participation to offerors who manufactured the products being offered and that the AM General technical proposal was acceptable as long as it met the product experience clause (i.e., that the truck offered be manufactured from commercially proven components), it may not raise these issues at this time.

Thus, IH's protest that AM General never manufactured the vehicle being offered, and that CCC, the previous manufacturer, could not be used to meet alleged experience requirements, are dismissed as being untimely.

IH has also alleged that the vehicle offered by AM General does not meet Government safety standards (FMVSS-121) required in the solicitation. Although this point was raised in IH's May 11 letter, the agency did not respond to the issue. IH, however, is apparently attempting to impose a requirement that bidders provide certification with their bids as to compliance with brake performance criteria. IH points out that its own chassis is certified as meeting the regulation while CCC's vehicle was tested after the submission of the technical proposal. While the brake standard was specified in the solicitation, there clearly was no requirement that the vehicle be formally certified to this standard prior to bidding. This fact was specifically stated at the pre-proposal conference held at TARCOM on January 18, 1977, and contained in the minutes of the conference, distributed to representatives of IH. There is no suggestion that AM General conditioned its offer in this regard. Moreover, there is no evidence that AM General is not committed to meet this requirement in performance of the contract. In any case, CCC's compliance with specified safety standards is a matter of contract administration and is not reviewable by our Office pursuant to our bid protest function.

B-189794

IH has raised several additional bases for protest. It alleges that the vehicle offered by AM General has never been sold commercially in the United States, in violation of the requirement that the product offered be "commercially proven." The solicitation, however, did not state that a product must have been domestically marketed in order for it to be "commercially proven." Moreover, the agency report confirms that there was no requirement for the vehicle to have been previously sold in the United States. The report stated: "It is not deemed significant that the Centaur I has only been actually sold to foreign markets. What is deemed essential and what the product experience clause looks to is the fact that the truck is comprised of commercially proven components."

IH also alleges that the manufacturer's current standard truck data book of either AM General or CCC was not in the hands of its authorized company representatives at the time of the step one proposal as required by the solicitation, and that AM General's bid, therefore, is nonresponsive. This allegation apparently arises from the portion of the product experience requirement which stated:

"The technical data herein referred to shall be identical to the specifications and technical material furnished by the offerors to their authorized company representatives for use in customer selection of vehicle models and components."

This provision, however, does not require that the standard truck data book be "in the hands of" authorized company representatives. Nevertheless, the record shows that AM General submitted in its step one technical proposal the data book for the CCC truck series. We agree with the agency that the document could be accepted as evidence that the truck was offered to the commercial market.

IH also alleges that AM General is not a responsible contractor, within the meaning of Armed Services Procurement Regulation (ASPR) § 1-904(a). It is our policy not to review

B-189794

protests concerning affirmative determinations of responsibility by a contracting officer unless there is a showing that the contracting officer's actions were tantamount to fraud, or there is evidence of failure to meet definitive criteria of responsibility contained in the solicitation. International Computaprint Corporation, 55 Comp. Gen. 1043 (1976), 76-1 CPD 289; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. There is no evidence of fraud and none has been alleged.

IH has suggested that AM General failed to meet definitive criteria of responsibility contained in the product experience qualification of the solicitation. The protester refers to the following solicitation provision:

"2. Product Experience Qualification

a. In order to obtain vehicles of demonstrated performance characteristics without the need for extensive acceptance or initial production testing and to permit the Army to enjoy the benefits of commercially developed products and product improvements, established quality control program, broad based parts availability and the assurance of achieving timely compliance with federal regulations involving energy, safety and environmental protection standards directed to vehicles for use by the truck transport industry, the following applies:

(1) Step One Technical Proposals will be accepted and considered only from those offerors proposing to supply the manufacturer's current standard commercial trucks, 55,000 to 75,000 lbs. GVWR, which are comprised entirely of commercially proven components, and which conform to all requirements of this Solicitation.

(2) The manufacture of a current standard commercial truck, 55,000 to 75,000 lbs.


B-189794

GVWR, and which is comprised entirely of commercially proven components will be the primary basis for Government reliance that the vehicles to be procured hereunder will satisfy the Government's needs."

IH apparently believes that the licensing arrangement with CCC, and AM General's lack of previous manufacturing experience of this particular truck, render AM General not responsible under this clause. However, it is our opinion that this solicitation provision does not establish definitive criteria of responsibility. Rather, the clause goes to what product must be offered.

Since there has been no showing of fraud or failure to meet definitive criteria of responsibility, the contracting officer's affirmative determination that AM General is responsible will not be questioned.

Accordingly, for the reasons stated above, the protest of IH is denied.


Deputy Comptroller General
of the United States