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R. Kleman
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DECISION

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

FILE: B-190089 DATE: March 2, 1978

MATTER OF: Kessel Kitchen Equipment Co., Inc.

DIGEST:

1. Protest alleging that solicitation is unduly restrictive (requirement that suppliers submit letters of commitment from manufacturers of offered products stating that sufficient products will be supplied to meet Government's requirements during contract period) and does not assure Government of maximum possible discounts which is filed several months after date set for receipt of offers is untimely under 4 C.F.R.§ 20.2(b)(1) (1977), and not for consideration on merits.

2. No objection taken to awards of contracts to offerors, including protester, where agency uniformly applied solicitation provision requiring suppliers to submit letters of commitment from manufacturers prior to award.

3. Protester has affirmative burden of proving case. Protester has not satisfied burden of proof where conflicting statements by parties constitute only evidence as to whether contracting officer awarded contracts during pendency of protest where no urgency existed.

4. Contention that bidder is not manufacturer or regular dealer within purview of Walsh-Healey Act is for consideration by contracting officer subject to final review by Department of Labor.

On January 14, 1977, the General Services Administration (GSA) issued solicitation No. FPGG-36273-N-2-15-77, which was a negotiated multiple award solicitation covering Federal Supply Schedule FSC Group 73, Part III, food service, handling, refrigeration, storage and cleaning equipment, for the contract period May 1, 1977, through April 30, 1978. February 15, 1977, was set as the date for receipt of offers.

Clause 260 of the solicitation stated in part as follows:

> "DEALERS AND SUPPLIERS: If other than manufacturer, offeror must submit letter from domestic manufacturer or foreign source stating that sufficient products will be supplied the offeror to meet the Government requirements through expiration of contract period."

On February 5, 1977, Kessel Kitchen Equipment Company, Inc. (Kessel), submitted an offer for 71 different product lines; however, it submitted only 33 letters of commitment from manufacturers required by Clause 260 of the solicitation. GSA determined that Kessel was not responsible with regard to the product lines where no letters of commitment had been provided for the entire contract period. Further, GSA awarded contracts under the solicitation to at least 64 offerors on the basis of urgency.

Kessel protests in substance as follows:

1. Clause 260 is unduly restrictive, does not assure that the Government will receive the highest possible discounts, and the implementation of the clause will result in collusion and clandestine agreements which will involve the Government in law suits. Moreover, Clause 260 discriminates against suppliers because it vests manufacturers with the authority to determine whether a supplier can make an offer. Further, Clause 260 is invalid because the letter of commitment between the manufacturer and supplier does not constitute a firm offer to the Government by the manufacturer; the only valid commitment is one which is made by the offeror and which is accepted by the Government. Thus, the letter of commitment required by Clause 260 does not assure the Government that suppliers can provide the offered products during the term of the contract.

2. Kessel is responsible. In fact, it has been awarded contracts under subject solicitation.

3. GSA has awarded contracts to suppliers based on letters of commitment from manufacturers which were scheduled to lapse before the expiration of the GSA contract.

4. Contracts should not be awarded to offerors which have submitted letters of commitment from manufacturers and whose prices are higher than those offered by Kessel.

5. All contract awards should be held in abeyance pending a resolution of the protest.

6. Two awardees were ineligible for award under the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1970), because they are not regular dealers of the offered products.

GSA states that it makes every effort to procure supplies and services by competitive bidding. However, Federal agencies have widely varying needs for supplies and services for which there are no Government specifications. Government specifications cannot be devised for many commercial products which are available only from a single manufacturer, or, in many instances, it is impractical to draft specifications which would differentiate between similar commercial products needed by Federal agencies.

Where a need exists for comparable commercial products GSA negotiates multiple award contracts with suppliers of such products, pursuant to General Services Administration Procurement Regulations, 41 C.F.R. § 5A-73.217, et seq. (1977). To be more specific, a single contract is awarded to the lowest responsible offeror of each commercial product, and the individual contracts are grouped together into a GSA supply schedule. An eligible Federal agency is required by regulation to order the lowest-priced product which meets its legitimate needs from the suppliers listed on the GSA supply schedule.

Before making an award, GSA must determine that a supplier is responsible. In many instances, GSA found that dealers, which had no firm commitment from a manufacturer or which did not have a firm commitment for the contract term, have not been able to fulfill their contractual requirements. Consequently, GSA requires that an offeror, other than a manufacturer, provide a letter from the manufacturer of the offered product stating that sufficient products will be supplied to the offeror to meet the Government's requirements during the contract period. This is the most practical way by which GSA can determine if an offeror is responsible.

The first allegation challenges the propriety of the solicitation. Since the protest was not filed with either the procuring activity or our Office until several months after the date set for receipt of offers, it is untimely under 4 C.F.R. § 20.2(b)(1) (1977) and not for consideration on the merits. 4 C.F.R. 20.2(b)(1) (1977) provides in pertinent part as follows:

> "(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals."

We also note that prior to protesting, Kessel submitted an offer along with the required letters of commitment, was afforded an opportunity to and attempted to rectify the inadequate submission of letters in some instances, and received awards on 24 items.

With regard to Kessel's second, third, and fourth allegations, GSA found that Kessel was responsible where its offer was accompanied with letters of commitment which satisfied Clause 260 of the solicitation. Further, the record indicates that, in the

instant case, GSA determined that suppliers, including Kessel, were nonresponsible with regard to products for which there were no corresponding letters of commitment. GSA states that it always requires a manufacturer's letter of commitment for the entire contract period before determining that a supplier is responsible. There is no question that awards of contracts to responsible offerors at reasonable prices, even though the prices are higher than those offered by nonresponsible offerors, are proper.

See Federal Procurement Regulations (FPR) § 1-1202(c) (1964 ed. amend. 95), which states in part that:

> "While it is important that purchases be made on the basis of offers which are most advantageous to the Government, price and other factors considered, this does not require an award to an offeror solely because he submits the lowest bid or offer. A prospective contractor must affirmatively demonstrate his responsibility and, when necessary, the responsibility of his proposed subcontractors."

As for the awards notwithstanding the protest, we stated in Southern Methodist University, B-187737, April 21, 1977, 77-1 CPD 289, that:

> "* * * a contracting officer may * * * proceed to make an award [while a protest is pending] * * * based upon a determination of urgency, that delivery or performance will be unduly delayed by failure to make award, or that a prompt award will otherwise be advantageous to the Government. See FPR § 1-2.407.8(b)(4). Our Office's Bid Protest Procedures provide that award during the pendency of a protest will be made as provided for in the applicable procurement regulations.

4 C.F.R. § 20.4 (1976). In the absence of evidence which clearly shows that a determination to make a prompt award was erroneous, our Office will not object to the agency's action. What-Mac Contractors, Inc., et al., B-187053(1), November 19, 1976, 76-2 CPD 438."

GSA states that contracts were awarded before Kessel filed its protest. Contracts were also awarded while the instant protest was pending because available information indicated that the products were urgently required by Federal agencies, delivery of the urgently needed commodities would be unduly delayed if the contracts were not awarded promptly, and prompt award would be otherwise advantageous to the Government. Kessel, on the other hand, contends that GSA has not awarded it a contract for one of the items which indicates that the food service equipment was not urgently required by Federal agencies, and a GSA representative stated that there was no pressing need to make awards during the pendency of the protest. According to GSA, it has not made an award to Kessel for the referenced product because Kessel has not furnished applicable discount terms as requested and GSA cannot determine the low offeror. Also, at no time did the GSA employees named by Kessel indicate that there was no need to make prompt awards. The protester has the burden of affirmatively proving its case. We do not believe that burden has been met where, as here, conflicting statements of the parties constitute the only evidence as to the existence of the urgency. Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. The inability of GSA to determine the low offeror on only one of the multiple items does not detract from the urgency.

Finally, we have held in numerous decisions that the responsibility for applying the criteria of the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1970), is vested in the contracting officer subject to final review by the Department of Labor. Therefore, we will not consider the merits of Kessel's contention that two awardees were not eligible for award under the Act because they are not regular dealers of the offered products. Capital Fur, Inc., B-187810, April 6, 1977, 77-1 CPD 237. GSA advises that the matter is currently under consideration by the Department of Labor.

Based on the foregoing, the protest is denied to the extent it has been considered on the merits.

R.F. Keller

Deputy Comptroller General
of the United States