15091 m. Fitzmaurice PLI

DECISION

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

[Request For Reconsideration]

FILE: B-198704

DATE: October 3, 1980

MATTER OF: Impact Instrumentation, Inc.--
Reconsideration

DIGEST:

Prior decision, dismissing protest, is affirmed where protester does not show that decision contains any error of fact or law.

Impact Instrumentation, Inc. (Impact), requests reconsideration of our decision in the matter of Impact Instrumentation, Inc., B-198704, July 28, 1980, 80-2 CPD 75. The pertinent facts in that case follow.

The Defense Logistics Agency (DLA) issued a solicitation on a brand name or equal basis for the procurement of 532 portable suction devices to be used in aspirating secretions, blood, etc., in the emergency treatment of unconscious or injured persons. One model manufactured by Impact and one model manufactured by Laerdal Medical Corporation (Laerdal) were identified as brand name items. Originally, March 6, 1980, was the closing date for the receipt of offers and by that date Impact and Laerdal had submitted offers. At that point, the contracting officials realized that the solicitation did not include two standard contract clauses. Therefore, on March 19, 1980, DLA issued an amendment which incorporated these two clauses in the solicitation and also established a new closing date of April 1, 1980. Upon receiving this amendment on March 25, 1980, Impact requested a further extension of the closing date so that it could reassess its proposal and perhaps offer a lower-line product which would be comparable to Laerdal's equipment but lower in price. However, on March 27, 1980, the contracting officer denied this request. In its initial protest to our Office, Impact stated it made no objection at that time because, under this negotiated procurement, it believed that the superior features offered by its product would offset any price advantage Laerdal might have.

~~012307~~ 113481

On April 23, 1980, Impact was notified that the contract would be awarded to Laerdal. On May 5, 1980, Impact filed a protest with our Office, arguing: (1) DLA should have granted its request for an extension of the closing date; and (2) Laerdal could not perform as required. However, we dismissed this protest, holding that Impact's first ground of protest was untimely because it was not filed with our Office prior to the date set for the receipt of initial proposals and that its second ground of protest was a matter for the contracting agency to determine in the administration of the contract.

On reconsideration, Impact makes three basic arguments:

> (1) DLA's denial of its request for an extension of the closing date was neither fair nor in the best interests of the Government;
>
> (2) Impact was misled by DLA procurement personnel who, in effect, told Impact that it could not protest until after an award decision was made and that the award would not be based solely on the lowest price; and
>
> (3) GAO did not address either Impact's claim that the Department of the Air Force has tested Laerdal's apparatus and found it deficient or its claim that the Department of the Navy has tried to develop its own suction unit because it was not satisfied with Laerdal's equipment.

As noted in the prior decision, our Bid Protest Procedures require that any protest based upon an alleged impropriety which is apparent prior to bid opening or the closing date for the receipt of initial proposals must be filed in our Office prior to either the date set for bid opening or the date set for the receipt of initial proposals. 4 C.F.R. § 20.2(b)(1) (1980). Thus, any protest Impact had regarding the closing date for the submission of offers had to be filed in our Office prior to April 1, 1980. Impact failed to do this. Therefore, its protest on this ground is untimely and cannot be considered.

Even if we assume that Impact filed a protest on this question with the contracting officer prior to the closing date for the receipt of initial proposals, this protest was denied on March 27, 1980. Under our Bid Protest Procedures, Impact had to file any protest based on that decision within 10 working days. 4 C.F.R. § 20.2(b)(2) (1980). Therefore, even under these circumstances, Impact's protest of May 5, 1980, is untimely and may not be considered on the merits.

Regarding Impact's contention that it was misled as to the time for filing a protest, we note that in its original protest Impact stated that it did not object to the contracting officer's refusal to extend the time for the submission of proposals because it believed that the technical superiority of its product would overcome any price advantage Laerdal might have. Thus, Impact's decision not to protest the contracting officer's refusal to extend the closing date was not due to any misinformation that it received about the time for filing a protest, but rather was due to Impact's belief that its product was so superior to Laerdal's that DLA would not be influenced by Laerdal's possible lower price. In any event, even though Impact indicates that DLA had the responsibility of informing Impact of its right to protest and the rules it had to follow, we note that our Bid Protest Procedures and their time constraints have been published in the Federal Register. 40 Fed. Reg. 1979 (1975). Consequently, protesters are charged with constructive notice of their contents. Post Marketing Corporation, B-197472, January 28, 1980, 80-1 CPD 76.

Impact also believes that the contracting officer misled it into believing that the product that was technically superior rather than the product that was lowest in price would be selected for the award. According to Impact, it was this information which influenced its decision not to protest the contracting officer's refusal to extend the solicitation's closing date. That is, Impact was confident that it would win the competition on the technical merits of its product. Yet, even if Impact is correct in stating that the contracting officer indicated that technical merit would be the most important factor in evaluating the proposals, we do not believe that this information was misleading.

We have held that even where a request for proposals assigns greater weight to technical factors, cost may nonetheless become the determinative factor if the proposals are found to be essentially equal technically. See, e.g., William Brill Associates, Inc., B-190967, August 7, 1978, 78-2 CPD 95. As indicated above, this brand name or equal solicitation identified both a Laerdal product and an Impact product as technically acceptable. Thus, by offering the brand name items, Laerdal's and Impact's proposals were, in effect, technically equal. Under these circumstances, then, cost can be used as the determinative factor in making the award. Therefore, we do not believe that Impact was misled merely because the contracting officer did not agree with Impact's view regarding the technical superiority of its product and apparently awarded the contract on the basis of the lowest cost to the Government.

In our prior decision, we held that whether Laerdal furnishes equipment that complies with the specifications is a matter for the contracting agency in the administration of the contract. We reached this conclusion because there was no evidence that Laerdal's offer took exception to any material specification. Impact's information regarding the Air Force's and the Navy's experience with Laerdal's equipment does not affect Laerdal's contractual obligation to furnish a product that complies with the specifications or DLA's obligation to insure that Laerdal's equipment does in fact meet those specifications. If by this contention Impact means to question Laerdal's responsibility, we note that our Office no longer reviews affirmative determinations of responsibility unless either fraud is shown on the part of the procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Aerosonic Corporation, B-193469, January 19, 1979, 79-1 CPD 35. Since neither of these exceptions is present here, we have no basis to question DLA's determination that Laerdal is a responsible offeror.

We conclude, therefore, that Impact has not shown that our decision of July 28, 1980, dismissing its protest, contained any error of fact of law. In light of this, that decision is affirmed.

Milton J. Socolar

For The Comptroller General
of the United States