



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Wright Tool Company

File: B-272413

Date: September 11, 1996

Sam Z. Gdanski, Esq., for the protester.

Marie Adamson Collins, Esq., General Services Administration, for the agency.

Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Low bid which unequivocally offered to perform in accordance with solicitation requirements is responsive; protest styled as questioning bid responsiveness which actually relates to affirmative determination of responsibility is not for review by our Office absent circumstances not present here.

DECISION

Wright Tool Company protests the award of a contract to Sigma West under invitation for bids (IFB) No. 6FES-G6-94G617-S, issued by the General Services Administration's Federal Supply Service, Tools Acquisition Division II, for tool kits made up of 10 items. Wright argues that Sigma's bid for one of the items was nonresponsive because Sigma offered a nonconforming product.

We dismiss the protest.

The solicitation, issued June 30, 1995, requested bids for tool kits consisting of 10 items which were further broken into components, with award to be made on an item-by-item basis to the low responsive bidders. Nine responses were received by the October 26, 1995, bid opening. Sigma submitted bids for items 2, 3, 4, 5, 8, and 10. Wright submitted a bid for item 8. Sigma was the low bidder on items 4, 5, 8, and 10. Wright's bid was second low for item 8.

At issue here is a component contained in Item No. 8, identified as No. 85 (5120-00-221-7980), a ratchet wrench, which was to be provided in accordance with Federal Specification GGG-C-744A, dated May 15, 1965, and Interim Amendment-1, dated January 12, 1971. Sigma's bid took no exception to these specifications.

Subsequent to bid opening, the contracting officer requested a Plant Evaluation Facility Report (PEFR) from a Quality Assurance Specialist (QAS) to determine Sigma's capability to meet the requirements of the contract. The PEFR recommended complete award to Sigma. Included with the PEFR was a letter from the QAS stating, "[i]t has been determined that an on-site survey is not necessary. A "Capable of Performing" recommendation was justified by the proposed awardee's current satisfactory performance." On January 30, 1996, the agency made award to Sigma for Item Nos. 4, 5, 8, and 10.

On February 1, Wright submitted a Freedom of Information Act (FOIA) request to the agency seeking information concerning the PEFR evaluation of Sigma. The documents responsive to Wright's request revealed to the contracting officer for the first time that Sigma had submitted a questionable commitment letter on Item 8, Component No. 85. Specifically, in a letter dated December 21, 1995, from Imperial Eastman, Sigma's supplier, Imperial stated that: "Imperial has discontinued the production of the 123-C three size ratchet wrench pending a detailed evaluation of our tooling." Imperial offered to provide Sigma a 125-C ratchet instead. Sigma was advised that once Imperial completed its evaluation, Imperial would decide whether or not it would continue to offer the 123-C three size ratchet wrench.

On March 28, Wright filed an agency-level protest in which it argued, based on the commitment letter from Imperial Eastman, that the "agency committed a deviation and accepted a non-compliant offer" and that these actions were arbitrary, capricious, and in bad faith. As a result of the protest, on April 24, the contracting officer requested the QAS to perform an "on-site" PEFR. On April 26, Sigma submitted a new commitment letter from Imperial Eastman stating that it would continue to manufacture the 123-C heavy duty ratchet wrench. Sigma's capability to perform was reviewed by QAS personnel and on June 17, a positive PEFR was received by the contracting officer. The PEFR stated that based on the April 26, letter of commitment from Imperial Eastman, Sigma was deemed capable of performing.

On June 18, the agency denied Wright's protest. The agency concluded that Component No. 85 of Item No. 8 was not a brand name item, and thus the contractor receiving the award has the right to procure the item from any manufacture that complies with the specification. The agency concluded that it had received adequate assurance that Sigma had the capability to provide an item that meets the specifications. This protest to our Office followed, raising basically the same grounds as those raised in the agency-level protest, with Wright maintaining that the agency allowed Sigma to deviate from the IFB specifications.

It is clear from the record that the bid submitted by Sigma was responsive to the terms of the solicitation. Component No. 85 of Item No. 8 was to be provided in accordance with the federal specification; the solicitation did not require a brand

name item and did not require the submission of descriptive literature.¹ Sigma in its bid made an unequivocal offer to supply the item in accordance with the specifications. Thus, Sigma legally obligated itself to supply Component No. 85 in exact accordance with the solicitation's specifications, and the question of whether it will in fact be able to supply conforming goods pertains to the firm's responsibility. Can-Am Indus., Inc., B-235922, Oct. 17, 1989, 89-2 CPD ¶ 361.

Prior to award, an agency is required to make an affirmative determination of the prospective awardee's responsibility, Federal Acquisition Regulation (FAR) § 9.103(b), which our Office will not review absent a showing of possible bad faith on the part of government officials, or misapplication of definitive responsibility criteria in the solicitation. Bid Protest Regulations 4 C.F.R. § 21.5(c) (1996).

Definitive criteria are not at issue, and there is no showing of possible bad faith here. Sigma was found responsible on the basis of a PEFR that found Sigma capable of performing and recommended complete award. When information was brought to the agency's attention indicating that the proposed awardee might not be able to perform in accordance with the specifications, an on-site PEFR was requested with specific instructions to examine Sigma's ability to provide the item in question in accordance with the solicitation's requirements. The second PEFR also concluded that Sigma was capable of performing and, on this basis, the contracting officer concluded that Sigma had the ability to provide the item in accordance with the specifications. The contracting officer reasonably relied on the PEFR findings that the awardee was responsible.

The protest is dismissed.

Comptroller General
of the United States

¹The protester argues that the bidder's descriptive literature evidences nonconformance with the specifications, hence rejection of the bid is required. However, the solicitation did not require the submission of descriptive literature and the December 21 letter from Imperial Eastman to Sigma, which was not a part of Sigma's bid, did not constitute descriptive literature.