DECISION

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

58892 95421

FILE: B-182921 DATE: July 11, 1975

MATTER OF: Norris Industries

DIGEST:

1. Although initial verbal protest against evaluation provision in first step solicitation of a two-step procurement may have been filed with contracting agency prior to closing date for receipt of first step proposals, subsequent protest to GAO was not timely since it was filed after bid opening despite requirement of 4 C.F.R. 20.2(a) that protest be filed within 5 days of notification of adverse agency action. Agency's issuance of second step solicitation after evaluation of technical proposals without taking action on protest is regarded as adverse agency action.

2. Assertion that second step bid is nonresponsive because it includes list of equipment which differs from equipment list furnished with Step I technical proposal is without merit, since the two lists were submitted for different purposes and list submitted with bid (for purposes of Economic Adjustment Clause) did not modify bidder's commitment to comply with its technical proposal.

3. Protester's assertion that low bidder's price is unreasonably high in view of its use of Government-furnished equipment on rent-free basis and should therefore be rejected does not provide basis for upholding protest, since determination of whether bid price is reasonable is responsibility of contracting agency and record does not establish that agency's determination of price reasonableness is arbitrary.

This protest involves the Army's failure to eliminate a competitive advantage accruing to one of two firms through the use of Government-owned equipment in a procurement calling for the establishment of a Mobilization base production line for 8-inch, M509 Projectile metal parts.

The procurement was initiated pursuant to two-step advertising procedures on March 15, 1974, with the issuance of a Step I request for technical proposal (RFP DAA25-74-R-0438) by the

Frankford Arsenal, Philadelphia, Pennsylvania. Two acceptable proposals were received, and on September 16, 1974, the Step II solicitation (invitation for bids No. DAA-25-75-B-0312) was issued to Norris Industries and to Chamberlain Manufacturing Corporation, the two acceptable offerors. At bid opening on December 13, 1974, Chamberlain was found to have submitted the apparent low bid of $17,599,548 while the Norris bid was $17,656,570. Norris has protested to this Office, alleging that Chamberlain has been permitted to realize a competitive advantage through the use of Government-owned equipment, that the Chamberlain bid was nonresponsive, and that the Chamberlain bid should not be accepted because its price was unreasonably high in the circumstances.

The Step I solicitation stated that offerors must have or acquire steel forging capability as a part of the production line, that any Government-owned equipment in the offeror's possession allocated to a Production Equipment Package (PEP) reserved for a mobilization project could not be used without permission of the cognizant contracting officer, and that "No evaluation factors for on-hand Government equipment will be used in the selection process. Lowest bid will govern selection." The record indicates that after Norris received the Step I proposal, it "protested verbally" about the competitive unfairness of Chamberlain's use of Government-owned forging equipment. Despite its protest, and after evaluation of the proposals submitted by Norris, Chamberlain, and another offeror, the Step II solicitation was issued on September 16 without provision for applying an evaluation factor to reflect use of Government-owned equipment. According to Norris, it then again verbally protested the "unfairness" of the procurement, both to Frankford Arsenal officials and to higher level Army officials. "When it became apparent" that Norris' protest "had not resulted in any change in the procurement," Norris sent what it describes as a "written protest" to the Assistant Secretary of Defense (Installation and Logistics). This letter was dated December 10, 1974, and a copy of it was furnished to the contracting officer immediately after bid opening. Norris' protest to this Office was received on December 26, 1974.

Norris claims that it did not file its protest with this Office sooner than it did because 4 C.F.R. 20.2(a) urges protesters to seek resolution of complaints initially with the contracting agency and because its own corporate policy requires doing "everything in our power to resolve the matter with the agency before protesting to your Office." Moreover, Norris states that it did not protest to our Office before bid opening because it did not have "definite knowledge" (only "sketchy sales intelligence") that the forging capacity to be used by Chamberlain was in fact Government-owned until the Army so indicated in its report filed in response to the protest.

We believe the record clearly establishes that the protest is untimely with respect to the first issue. 4 C.F.R. 20.2(a) states that protests based on alleged solicitation improprieties must be filed prior to bid opening or the closing date for receipt of proposals. Statements in the Norris protest documents ("* * * the agency should have developed an evaluation factor to be added to the solicitation for the second step"; "the Government should have modified its second step solicitation to indicate that the original acquisition cost of the Government-owned equipment to be used by each bidder shall be added to the bid prices * * *.") make it abundently clear that the Norris assertion of unfairness essentially involves an alleged defect in the second step invitation. However, it was a statement in the first step solicitation which established the method of bid evaluation for the second step of the procurement, and it is this method to which Norris objects. Although Norris states that it protested to the contracting officer "after receipt of the first step sometime during April of 1974," the Army denies that Norris protested prior to the April 30, 1974 date set for receipt of proposals. We also note that Norris transmitted its proposal by letter dated April 25, 1974, and that letter made no mention of any objections Norris might have had with regard to the RFP. Thus, it is not clear that Norris did in fact protest prior to the date set for receipt of proposals.

However, even if Norris did protest prior to April 30, 1974, the protest filed here would still be untimely. 4 C.F.R. 20.2(a), which states that protesters are urged to first protest with the agency, also recognizes that there can only be effective remedial relief if there is an expeditious final resolution of the matter and therefore requires that protests initially filed with the contracting agency must be filed with this Office within 5 working days of receipt of notification of adverse agency action on the protest. See 52 Comp. Gen. 20 (1972). We have also held that adverse action need not be a formal denial of the protest, but could take the form of a procurement action, such as the award of a contract, 52 Comp. Gen. 20, supra; continued agency acquiescence in contract performance and failure to take action with respect to a protest, 52 Comp. Gen. 792 (1973) and 54 id. 97 (1974); the opening of bids, Leasco Information Products, Inc., et. al., 53 Comp. Gen. 932 (1974) and East Bay Auto Supply, Inc., et. al., 53 Comp. Gen. 771 (1974); or the opening and consideration of proposals. Advance Conversion Devices Company, B-182679, February 12, 1975 and Poquito-Longwood Area Civic Association, Inc., B-183210, March 12, 1975. Thus, even if Norris did protest prior to the date set for receipt of proposals, we think such initial adverse agency action was

present by virtue of the Army's issuance of the second step solicitation on September 16, 1974, following its receipt and evaluation of proposals, all without taking action with respect to Norris' assertion regarding unfair competitive advantage. As indicated above, Norris did not file its protest with our Office until after the December 13, 1974 bid opening.

Although for the above reasons we consider the Norris protest on the first issue to be untimely, we note that portions of the Norris protest letters suggest that the timeliness of the protest should be determined as though the matter complained of concerns a defect solely of the second step solicitation. We do not agree that the protest should be so viewed, since, as noted above, it was the first step RFP which established the evaluation procedures for the Step II portion of the procurement and thus what is objected to clearly is based on what was set forth in that Step I solicitation. In this regard, we have made it clear that the requirement of 4 C.F.R. 20.2(a) that solicitation defects must be protested prior to the closing date for receipt of proposals means that in two-step solicitations alleged Step I solicitation defects must be protested prior to the Step I closing date. See 53 Comp. Gen. 357 (1973).

With regard to Norris' assertion that it did not have definite grounds for protest until after it learned that Chamberlain in fact based its bid on the proposed use of Government-owned forging equipment, we think it is evident from the record that Norris' concern was primarily directed to the absence of an evaluation factor which would be applied in the event a bidder intended to use Government-owned equipment, rather than to the actual basis for Chamberlain's bid. Thus, while Norris correctly states that any protest it would have filed sooner would have been moot if Chamberlain had not proposed to use the Government's forging equipment, the fact remains that what Norris complains of is an alleged solicitation defect and not the Chamberlain bid. For a somewhat analogous situation, see Mission Van & Storage Company, Inc. and MAPAC, Inc., a joint venture, 53 Comp. Gen. 775 (1974), in which we held that a protest based supposedly on an incumbent contractor's allegedly unbalanced bid was actually directed against the estimates contained in the invitation for bids.

Norris also asks that if we regard the protest as untimely, we consider it under 4 C.F.R. 20.2(b). That section provides that the Comptroller General, "for good cause shown, or where * * * a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely." We have stated that good cause generally refers to "some compelling reason, beyond the protester's control, which has prevented him from filing a timely protest" and that a significant issue refers "to

the presence of a principle of widespread interest." 52 Comp. Gen. 20, 23 supra. It is not contended that Norris was kept from filing a timely protest because of any compelling reason beyond its control and therefore we do not see any good cause for considering the issue which was untimely protested. We also believe that the bid evaluation method used here does not relate to a principle of widespread interest, since it would appear to be limited to the type of unusual situation presented here, which even Norris states is "truly unique." Accordingly, we must decline to consider the issue. See, e.g., Leasco Information Products, Inc., et. al., 53 Comp. Gen., supra, at 946-948; 53 id. 357 (1973).

The alleged nonresponsiveness of Chamberlain's bid concerns differences between equipment listed in that firm's Step I proposal and Step II bid. The Step I RFP required technical proposals to include a List of Equipment containing the following information:

"(1.) Identification of item (include mfg. and model number where possible).

"(2.) Quality required.

"(3.) Operation it supports.

"(4.) Categorize as follows:
On-hand - Contractor owned
On-hand - Government Property
To be purchased or fabricated - Contractor financed
To be purchased or fabricated - Government financed through contract price."

The Step II IFB contained an Economic Price Adjustment Clause (Armed Services Procurement Regulation (ASPR) 7-107 (1974 ed.)) which called for the listing of labor categories and items of material, including vendor, quantity, and cost of the items. This clause provides for a price adjustment in the event of a change in unit price of the materials listed or in the applicable wage rates. Norris claims that the Chamberlain bid is nonresponsive because the equipment listed in the bid under that clause is not identical to that listed in Chamberlain's technical proposal.

A principal feature of two-step formal advertising is that a second step bid may be considered responsive only if it is based on a first-step technical proposal determined to be acceptable by the agency. See ASPR 2-503.2; 45 Comp. Gen. 221 (1965). If the bid deviates in a material way from that technical proposal, it must be rejected as

nonresponsive. However, we do not agree that Chamberlain's bid is nonresponsive. Rather, we agree with the Army that the two lists were required for different purposes and were not required to be identical, either with respect to number of items or with respect to the nomenclature and identification of items.

In its Step I proposal, Chamberlain included a seven page listing of equipment which would be used to establish the production line. In its Step II bid, Chamberlain bound itself to furnish a production line in accordance with the specifications and its technical proposal, which was incorporated into the IFB and its bid by reference. The listing of labor categories and equipment items in the bid under the heading "ECONOMIC ADJUSTMENT BASIS" was clearly for the purposes of the economic adjustment clause and did not modify Chamberlain's commitment to adhere to its technical proposal. In this regard, we point out that we do not regard it likely that a bidder submitting an acceptable Step I proposal would qualify its Step II bid by deviating from the accepted proposal, and that such alleged qualifications must be examined in light of the presumption that the bidder's intention was to bid in accordance with solicitation requirements. See 52 Comp. Gen. 821 (1973); 50 id. 337 (1970); 45 id. 221, supra.

Finally Norris claims that Chamberlain's price is unreasonably high and therefore should be rejected under the authority of ASPR 2-404.2(e), which permits a contracting officer to reject a bid when he "determines in writing that it is unreasonable as to price." Norris asserts that although Chamberlain did not have to acquire the Government-owned forging equipment, which Norris values at more than $1.6 million, Chamberlain bid only approximately $57,000 less than Norris. The protester believes that by accepting Chamberlain's bid, the Government would be "paying more and buying less." The Army, however, points out that under Chamberlain's technical approach it will procure for the Government's account 89 pieces of equipment while Norris, under its approach, would procure only 60 items. The Army further states that what is being purchased is not merely an aggregate of equipment items, but a mobilization base production line with a demonstrated performance capacity, with the contractor having to furnish the needed expertise as well as bearing the risk of "extensive and costly debugging." As the Army views it, Norris and Chamberlain are proposing to attain this performance capacity by two "different acceptable methods," so that "comparison of the details of the two different methods is not pertinent."

Norris does not agree with the Army's point and states that any Army determination that Chamberlain's price is reasonable would be arbitrary. Norris' position is based on its doubts that the allegedly

excessive cost inherent in Chamberlain's bid is to cover risk and on its belief that the Army is in fact buying only equipment and not a production capacity. Norris bases this latter argument on a provision in the Step I RFP which requires the bidder "as part of this procurement to agree to enter into a 5 year minimum facilities use contract * * * prior to contract completion" and in any event to maintain the production line in place for a period of 90 days after acceptance by the Government in the event a facilities contract is not awarded. Norris says that this agreement to enter into a facilities contract is no agreement at all, and that the Army therefore is not assured of getting a production line, but is merely buying equipment that will be maintained as a production line for only 90 days.

The determination of whether a bid price is reasonable is the responsibility of the contracting agency and will not be disturbed by this Office unless it is arbitrary or made in bad faith. Southern Space, Inc., B-179962, March 29, 1974; B-171472, May 11, 1972 and cases cited therein. On this record, we cannot conclude that the agency's determination of price reasonableness is arbitrary. Clearly, Norris is in no position to determine how Chamberlain evaluates risk or what value should be placed on Chamberlain's expertise. In addition, we think it evident that this procurement envisions more than the mere purchase of equipment regardless of the possibility that the production line will be maintained for only 90 days. In any event, we think the Army is in the best position here to determine the cost reasonableness of acquiring the line. Here, the Army points out that in addition to equipment costs and the risk factor, the bid prices include engineering and design costs, overhead, general and administrative expenses, and profit. The Army has determined that the price bid by Chamberlain is "fair and reasonable," and we see no reason to interpose any objection to the Army's determination.

For the foregoing reasons, the protest is denied.

Paul G. Dembling

For the Comptroller General
of the United States