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DECISION



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

FILE: B-191099

DATE: May 25, 1978

MATTER OF: American Abrasive Metals Company

DIGEST:

Estimated peak monthly requirements (EPMR) for items were not halved when items were divided into set-aside and non-set-aside portions, but rather total EPMR was listed as EPMR of each subitem. IFB required that offeror's listed monthly supply potential must be able to cover total EPMR's for which offeror was low. Therefore, it was improper and not consistent with IFB to total EPMR's for subitems in bid evaluation.

American Abrasive Metals Company (AAM) has protested the award of two requirements contracts to Palmer Products Incorporated (Palmer) for nonslip flight deck compound under invitation for bids (IFB) No. 8FPQ-S1-30083 issued by the General Services Administration (GSA). Basically, AAM contends that GSA evaluated the bids in a manner inconsistent with that set forth in the IFB and this incorrect bid evaluation resulted in AAM being found nonresponsive for several items for which it was low bidder.

Construction of IFB

AAM is protesting the award of items 9A, 9B and 9F. Item 9, partially set aside for small business, was presented in the IFB as follows:

"ITEM 9 - PARTIAL SET ASIDE

ITEMS 9A THRU 9E NOT SET ASIDE FOR SMALL BUSINESS.

		<u>EPMR*</u>	<u>ECQ**</u>	<u>UNIT</u>	<u>UNIT PRICE</u>
9.	5610-00-857-2453				
(A)	Duluth, GA (A-4)	750 (2)	1500	KT	\$ _____
(B)	Stockton, CA (S-1)	750 (2)	1500	KT	\$ _____
(C)	Auburn, WA (T-1)	325 (2)	650	KT	\$ _____
(D)	Norfolk, VA (W-3)	1200 (2)	2400	KT	\$ _____
(E)	Honolulu, HI (S-7)	150 (2)	300	KT	\$ _____

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ITEMS 9F THRU 9J SET ASIDE FOR SMALL BUSINESS.

(F) Duluth, GA	(A-4)	750	(2)	1500	KT	\$	_____
(G) Stockton, CA	(S-1)	750	(2)	1500	KT	\$	_____
(H) Auburn, WA	(T-1)	325	(2)	650	KT	\$	_____
(I) Norfolk, VA	(W-3)	1200	(2)	2400	KT	\$	_____
(J) Honolulu, HI	(S-7)	150	(2)	300	KT	\$	_____

*EPMR DENOTES ESTIMATED PEAK MONTHLY REQUIREMENTS.
NUMBERS IN PARENTHESIS AFTER EPMR INDICATE ESTIMATED
NUMBER OF ORDERS EXPECTED TO BE PLACED DURING CON-
TRACT TERM.

**ECQ DENOTES ESTIMATED CONTRACT QUANTITY."

The GSA Inventory Management Branch, Region 8, provided the Procurement Office a requirements forecast specifying ECQ and EPMR for each destination, Duluth, Stockton, Auburn, Norfolk and Honolulu.

GSA states that:

"When the decision was made to partially set aside, for small business, quantities of certain stock items, it was necessary to divide the stock items' estimated contract quantities into two bid items for each destination, one set-aside and the other not set-aside. The estimated frequency of order placement was divided.

Example: Original forecast - ECQ = 3000 units,
EPMR = 750 units, number of orders = 4.
Revised forecast - ECQ = 1500 units,
EPMR = 750 units, number of orders = 2.

"The estimated peak monthly requirement could not be divided for the reason if different bidders were low on each bid item, it must be established that each bidder is willing and has the capacity to produce material in sufficient quantities to meet the estimated peak monthly requirement, if so ordered."

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In applying this analysis to items 9A and 9F, we find that before the requirements for Duluth were divided, the ECQ was 3,000 units, the number of orders expected was 4 and the EPMR was 750 units. That is, if 9A and 9F were one item, a successful contractor could expect to have to supply 3,000 units over 4 months at a rate of 750 units per month. Once the Duluth requirements were subdivided into two items the ECQ was 1,500 units per item, the number of orders was 2 and the EPMR remained at 750 units because that amount could still be needed from any one contractor for Duluth in any single month.

The following clause was included in the IFB:

"MONTHLY SUPPLY POTENTIAL:

(a) The estimated requirements of the Government for the contract period and the estimated peak monthly requirements are shown in the schedule of items. Bidders are requested to indicate, in the spaces provided, the total quantity per month which they are willing to furnish. This monthly supply potential will not* be used in order to preclude the placement of orders in excess of a contractor's production capacity. Bidders are urged to group as many items or groups of items as possible in setting their monthly supply potential since the items or groups for which they may be eligible for award cannot be predetermined. Such grouping will make it possible to make the fullest use of the production capacity of each successful bidder. For example, if a bidder's production facilities can produce all of the items, or groups, solicited, the bidder may insert a single overall limitation on the quantity that he can supply. Bidders are cautioned that in order to qualify for an award, their monthly supply potential must cover the Government's estimated peak monthly requirement for each item or group to be awarded. Groups or individual items will not be subdivided for award purposes.

*If a bidder does not specify a monthly potential, he will be deemed to offer to furnish 125 percent of the Government's estimated peak monthly requirement

for the item or group of items. The quantity shall then be considered as the bidders monthly supply potential.

BIDDER'S MONTHLY SUPPLY POTENTIAL

<u>ITEMS OR GROUP OF ITEMS</u>	<u>BIDDER'S MONTHLY SUPPLY POTENTIAL</u>
_____	_____ "

(*Note: The "not" was included in the IFB as a typographical error and has been treated as if it were omitted.)

Finally, the Method of Award clause included in the IFB provided:

"Award will be made item-by-item destination-by-destination on the basis of the Government's estimated peak monthly requirements to the low responsive offerors up to their stated monthly supply potentials. Within the limits prescribed by the offeror, the Government will apply offeror's monthly supply potential to any items offered, as the Government's interest requires. In order to qualify for an award, the offeror's monthly supply potential must cover the Government's estimated peak monthly requirement for each individual item to be awarded to the offeror. Individual item quantities will not be subdivided for award purposes. Further evaluation will be made on the partial set-aside items 6D thru F, 9F thru J, 13C, D, and 14A in accordance with GSA Form 1773." (Emphasis added.)

Basis of Protest

AAM was low bidder on items 9A, 9B, 9D, 9E, 9F, 9G, 9I, and 9J, as well as items 4 and 8. AAM specified 20,000 gallons (4,000 kits) as its monthly supply potential. In evaluating the bids for award, the contracting officer (C.O.) totaled the EPMR's for all items on which AAM was low, apparently assuming that this was required by the Method of Award clause.

The evaluation of item 9 was done in the following manner. AAM was low on both the set-aside and non-set-aside subitems for Duluth (9A and 9F), Stockton (9B and 9G), Norfolk (9D and 9I) and Honolulu (9E and 9J).

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Even though the EPMR's for each destination had not been halved when the estimated requirements were divided into set-aside and non-set-aside subitems, the C.O. added the EPMR's together for each destination in evaluating the bids. For example, before dividing the requirements for Duluth, the ECQ was 3,000, the estimated number of orders 4, and the EPMR 750. In evaluating the bids in the above manner, however, the requirements for Duluth were treated as ECQ = 3,000, orders = 4 and EPMR = 1,500. Thus, the bid evaluation method employed had the effect of doubling the original EPMR for evaluation purposes for each destination if the same firm was low on both the set aside and non-set-aside subitems for the destination.

Using this method, since AAM was low on both the set-aside and non-set-aside portions for four of the five destinations listed in item 9, the total EPMR's exceeded AAM's listed monthly supply potential, and it was, therefore, found nonresponsive for items 9A, 9B and 9F.

AAM contends that the C.O. misinterpreted the solicitation in evaluating bids in this manner. The protester argues that in totaling the EPMR's for evaluation purposes, since the total EPMR was listed for both the set-aside and non-set-aside portions of each destination's requirements, when the same bidder is low on both portions the EPMR listed in each place should be counted only once. AAM argues that to do otherwise doubles the actual EPMR for each destination. AAM contends, therefore, that the solicitation clearly requires evaluation of bids as it argues.

AAM also contends that to evaluate bids in the manner done by GSA is in conflict with other parts of the solicitation, including the maximum order limitation clause, and makes the EPMR's out of harmony with the ECQ's and number of orders. AAM also argues, in the alternative, that if the C.O.'s bid evaluation method is correct, then the solicitation must be improperly constructed.

GSA's Response

GSA characterizes AAM's protest as being based on two grounds:

"(1) that the solicitation was 'improperly constructed,' i.e. that the Government's estimated peak monthly requirement (EPMR) is incorrect and should have been lower * * *; and

"(2) that the contracting officer for the purpose of making awards should have 'interpreted' the solicitation's quantitative requirements in such a manner as to allow awards on the basis of the prior experience with the bidder rather than on the basis of tendered capacity appearing in the protester's bid document."

Regarding the first ground, GSA argues that the protest is untimely under § 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977), which requires that protests based on alleged patent defects in a solicitation be filed before bid opening.

Concerning the merits of the first ground, GSA states that in constructing the solicitation the C.O. determined that for ease of contract administration for items partially set aside, " * * * a bidder for either the set-aside or non-set-aside portion of an item must have the capability of meeting the Government's estimated total monthly supply potential for that item." (Emphasis added.) GSA then states that using the total EPMR figure for both the set-aside and non-set-aside portions of an item was reasonable and within the exercise of the C.O.'s discretion and that all bidders were put on notice of these figures.

Concerning the second ground, GSA states that AAM appears to be arguing that GSA should have evaluated its bid on the basis of past experience rather than on its listed monthly supply potential. GSA concludes that evaluating AAM's bid on that basis would be " * * * improper, and a gross disregard of the basic procurement statutes and regulations."

Timeliness

As discussed above, GSA partially characterizes AAM's protest as being against the construction of the solicitation which should have been filed before bid opening.

While AAM does argue in the alternative that, if the C.O.'s method of bid evaluation is proper, the solicitation is defective, AAM's primary argument is that the C.O. evaluated the bids in a manner plainly inconsistent with that set out in the IFB. Thus, the protest is not one against the construction of the solicitation, but rather against the evaluation of bids by the C.O. That is, AAM's primary argument is that the solicitation is correct, but the C.O. evaluated bids in a manner inconsistent with the solicitation.

AAM could not have known of this ground of protest until January 3, 1978 (the date of award), at the earliest. Since its protest was received on January 17, 1978, within 10 working days of January 3, it is timely.

Merits

GSA appears to have misconstrued AAM's protest and responded to its own misinterpretation. The protester does not attack the EPMR's set forth in the IFB nor does it argue that listing the total destination EPMR for both the set-aside and non-set-aside portions of an item is improper. Neither does the protester argue that its listed monthly supply potential be disregarded in making award. What AAM does argue is that, since the total destination EPMR's were retained for both the set-aside and non-set-aside portions of each subdivided item, the EPMR should be counted only once for both the set-aside and non-set-aside portions in evaluating bids; otherwise, the actual EPMR for each destination is doubled in the evaluation. If bids were evaluated in the manner argued for by AAM, the total EPMR's for items on which it is low would be within its monthly supply potential as listed and it would have been awarded items 9A, 9B and 9F.

In support of the method of bid evaluation used, GSA makes only the following two statements:

- (1) * * * * Our regional office has also shown that in making awards it complied in all respects with the award procedure which was set forth in the Method of Award clause of the solicitation. In this regard, it is to be noted that

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the solicitation's Method of Award clause includes the following admonition:

'In order to qualify for an award, the offeror's monthly supply potential must cover the Government's estimated peak monthly requirement for each individual item to be awarded to the offeror. Individual item quantities will not be subdivided for award purposes.'

(2) " * * * In accordance with the terms of the solicitation it was required that estimated peak monthly requirements for each bid for which an offeror appeared to be in line for award be totaled in order to determine their bid's responsiveness. * * * " (From the statement of the Regional Office).

We see nothing in the Method of Award clause, or elsewhere in the solicitation, that would compel or permit the method of bid evaluation used by the C.O. GSA has admitted in several instances that the EPMR listed for each subitem for any destination under item 9 is the same as the total EPMR for that destination. GSA has not, however, shown why the EPMR's for each subitem should then be added together in evaluating bids, thus resulting in a figure admittedly double the actual EPMR.

The Method of Award clause does not require that the EPMR's for every subitem be mechanically totaled, even though they obviously represent the same total EPMR. The clause requires only that the offeror's monthly supply potential cover the EPMR for each individual item to be awarded. Therefore, for example, if a bidder were low on 9A and 9F, the set-aside and non-set-aside requirements for Duluth, and listed 1,000 kits, as its monthly supply potential, it could still cover the total EPMR for both subitems since, according to GSA, the 750 EPMR listed for each subitem is the same as the total for both subitems.

Accordingly, the protest is sustained.

In the circumstances, henceforth no orders for items 9A, 9B and 9F should be placed with Palmer and the requirements (no guaranteed minimum quantity) contract award for

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those items should be terminated and awarded instead to AAM for the balance of the contract period.

As this decision contains a recommendation for corrective action, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 51 U.S.C. § 1176 (1970).


Deputy Comptroller General
of the United States