PL-II

DECISION

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

10,607

FILE: B-193792 DATE: June 28, 1979

MATTER OF: Snowbird Industries, Inc. DLG 01959

DIGEST:

1. Post-award protest that solicitation improperly permitted First Article Testing as alternative to QPL listing is untimely since allegations of solicitation improprieties must be filed prior to closing date for receipt of proposals. 4 C.F.R. § 20.2 (b)(1).

2. Allegation that agency failed to conduct negotiations with offerors in competitive range, is untimely where not filed within 10 working days from date basis for allegation should have been known. 4 C.F.R. § 20.2(b)(2).

3. Question of whether offeror is manufacturer or regular dealer under Walsh-Healey Act is for determination by contracting agency, subject to review by Secretary of Labor.

4. Offeror's ability to comply with date for first article submission is matter of offeror responsibility, not "responsiveness" of offer, and is not for consideration under GAO Bid Protest Procedures.

5. Allegation that successful offeror may have submitted "late" proposal is factually refuted by record.

6. Solicitation's First Article Approval clause did not, as alleged by protester, require manufacture of first article in contractor's facilities, but merely

[Contract Award Protests] ~~005729~~

in facilities in which item is to be produced; thus, where manufacture of item is subcontracted, clause merely requires manufacture of first article in subcontractor's facilities.

6. In view of affirmative determination of successful offeror's responsibility pursuant to conduct of pre-award surveys, protester's doubts concerning the successful offeror's financial capability and production equipment are not for review by GAO.

7. Allegation of possible violation of protester's proprietary data concerns dispute between two private parties which will not be considered by GAO.

8. Procurement of an item ~~under authority of 10 U.S.C. § 2304(a)(10)~~ because only one offer was received in the past no longer appears appropriate since several offers were received in response to a RFP which permitted first article testing in lieu of QPL listing.

Snowbird Industries Inc. (Snowbird), the second low offeror, protests the award of a contract by the Defense Logistics Agency (DLA), Defense General Supply Center (DGSC), Richmond, Virginia, to Adrick Cooling Corporation (Adrick), the low offeror under request for proposals DLA 400-78-R-1394 for an estimated annual quantity of ice making machines.

DLG 00228
DLG01960

Snowbird's post-award protest raises a number of issues, several of which are not appropriate for consideration by our Office or are untimely filed under our Bid Protest Procedures, 4 C.F.R. § 20.2 (1978).

Snowbird contends that it was improper for the solicitation to have permitted First Article Testing as an alternative to offering a product listed on a Qualified Products List (QPL). Snowbird argues that this is inconsistent with the Defense Acquisition Regulation (DAR) and that it is unfair to require firms such as itself, which have invested time and money to qualify for listing on the QPL, to compete with firms that have not undergone similar expense and effort. However, permission to undergo First Article Testing in lieu of QPL was clearly set out on the solicitation's schedule page, and section 20.2(b)(1) of our Bid Protest Procedures requires, in pertinent part, that protests based upon alleged improprieties which are apparent in a solicitation be filed prior to closing date for receipt of proposals. Snowbird's allegation is therefore untimely.

We also find untimely the allegation that the contracting officer failed to conduct negotiations with offerors within the competitive range as required by DAR § 3-805.1.

In this regard, section 20.2(b)(2) of our Bid Protest Procedures requires that in instances other than those addressed by 20.2(b)(1), supra, bid protests shall be filed not later than 10 working days after the basis for the protest is known or should have been known, whichever is earlier. The term "filed" means receipt in the contracting agency or the GAO, as the case may be. 20.2(b)(3). Award in this instance was made on November 2, 1978, and Snowbird's correspondence to DLA indicates that it was aware of the award to Adrick as of November 20, 1978. Inasmuch as Snowbird should have been placed on notice by that time that no negotiations were or would be conducted on its proposal, we find it incumbent upon Snowbird to have made this allegation, within 10 working days of November 20, 1978, at the latest. Since this allegation was first received by GAO (and therefore "filed") on March 5, 1979, it also is ineligible for our consideration.

Snowbird also contends that Adrick may not be a regular dealer or manufacturer of the items within the meaning of the Walsh-Healey Act (41 U.S.C. §§ 35-45 (1976)). We do not consider this issue because such a matter is by law for the contracting agency's determination in the first instance, subject to the Secretary of Labor's review. Schering Corporation, B-193872, March 30, 1979, 79-1 CPD 221. In this regard, the contracting officer has advised us that the matter has been referred to the Department of Labor.

Also not for our consideration is the allegation that Adrick's offer should have been considered "non-responsive" because it should have been apparent to DLA that Adrick could not meet the date required for first article submission. An offeror's apparent ability to meet performance requirements relates to the responsibility of that offeror, not to the "responsiveness" of the offer. This Office generally does not consider challenges to a determination that an offeror is responsible. See Infra p.6.

Remaining for our consideration are allegations by Snowbird that the time stamps on Adrick's telegraphic offer do not clearly indicate that Adrick's price quotations were received prior to 2:00 p.m., September 5, 1978, the deadline for receipt of offers; that paragraph "h" of the "First Article Approval-Contractor Testing" clause on page 30 of the solicitation requires manufacture of the first article at Adrick's facility, but Adrick merely operates a repair service on an off-premises basis utilizing the services of independent contractors; that Adrick purportedly acquired obsolete tooling from York Corporation for manufacture of this ice maker, and since York has not been a qualified supplier since 1968, doubt is cast upon Adrick's ability to successfully manufacture the item; that if Adrick had not in fact taken title to the York Corporation tooling, it is culpable of misrepresentation to government personnel in the course of a pre-award survey; that Adrick and its

subcontractor, MGR Equipment Corporation (MGR) may not be responsible firms since their principals allegedly are former executives of a bankrupt corporation; and that MGR has improperly contacted one of Snowbird's suppliers to fabricate components under Snowbird's proprietary drawings.

Telegraphic offers were permitted by the solicitation, and Adrick submitted its offer through a telegraphic price quotation which referenced the request for proposals and advised that a fully executed proposal package was in postal transit. The telegram bears a DGSC receipt stamp of "245 78 1402" which DLA explains to be the 245th day of 1978 (ie, September 2) at 1402 hours, or 2:02 p.m. Both the telegram and a confirming mailgram also bear stamps evidencing receipt by the Directorate of Procurement (the office designated for submission of offers) in the morning hours of September 5, 1978, ranging in time from 7:30 a.m. to approximately 11:00 a.m. Consequently, we find Snowbird's implication of a late proposal without a factual basis.

We disagree with Snowbird's interpretation of the First Article Approval clause as requiring manufacture of the first article in Adrick's facility. The provision at issue stipulates:

> (h) The First Article offered must be manufactured at the facilities in which that item is to be produced under the contract, or if the First Article is a component not manufactured by the Contractor, such component must be manufactured at the facilities in which the component is to be produced for the contract * * *"

In this regard, the solicitation did not prohibit subcontracting for the manufacture of the item, and Adrick in fact subcontracted with MGR for the manufacture of the ice makers. Consequently, the cited clause merely requires that the first article be manufactured at MGR's facilities since that is the designated source of production under the contract.

As for Snowbird's doubts whether adequate tooling is available to produce the item, and whether Adrick has the requisite financial capability to perform the contract, DAR § 1-903 establishes these matters, inter alia, as minimum standards for "responsible" prospective contractors, requiring an agency determination in the affirmative as a condition precedent to award of a contract. In this regard, pre-award surveys were performed on both Adrick and MGR, with a resultant recommendation of award. It should be specifically noted that MGR's plant facilities and equipment were inspected and found satisfactory, and Adrick was determined to possess a satisfactory line of credit. DLA further advises that the contracting officer is unaware of any intent by Adrick to acquire York's tooling, but considers the matter irrelevant since MGR was found to possess the requisite tooling in satisfactory condition; nor did he have notice prior to award of any material misrepresentation by Adrick in the course of the pre-award survey.

As a general rule, we do not review protests concerning a determination, as here, that a prospective contractor was responsible. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Affirmative determinations of responsibility are largely a matter of subjective judgment within the sound discretion of contracting agency officials, who must bear the brunt of any difficulties experienced by reason of a contractor's inability to perform. 39 Comp. Gen. 705 (1960). We will review such determinations only in certain limited circumstances--if there is a showing of fraud by the agency, or if it is alleged that definitive responsibility criteria were not properly applied by the agency. See Data Test Corp., 54 Comp. Gen. 499 (1974), 74-2 CPD 365. Since the affirmative determination of Adrick's responsibility is not challenged on the basis of fraud by DLA or alleged misapplication of definitive responsibility criteria, Snowbird's objection to such determination will not be further considered.

Snowbird's allegation that MGR "contacted" Wedj, Inc. to fabricate components from Snowbird's proprietary drawings in Wedj's possession has not been substantiated

by the protester and is not supported by the pre-award survey report. In any event, this is essentially a dispute between two private parties which this Office shall not resolve. Dillon Lumber Co., Inc., B-188631, April 8, 1977, 77-1 CPD 249.

The protest is dismissed in part and denied in part.

We note, however, that the procurement was negotiated under the authority of 10 U.S.C. § 2304(a)(10)(1976) upon a determination that formal advertising was impracticable since prior solicitations had resulted in the receipt of but one offer, and that competition was not therefore anticipated.

We have reservations over the use of the cited negotiation authority in this instance. It would appear that the lack of competition in prior procurements was attributable to restriction of the item to QPL listing rather than to the difficulty or impossibility of drafting adequate specifications, and that the competition received under this procurement was the result of action permitting first article testing as an alternative to QPL qualification. Consequently, even though competition may have been lacking in the past, we are suggesting to the Director of DLA that the use of the negotiation authority used here would appear to be improper in future procurements of these ice making machines.

R. F. Keller

Acting Comptroller General
of the United States