

DECISION



11983 K. Kelly
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

Proc I

FILE: B-193405

DATE: November 9, 1979

MATTER OF: Rolair Systems, Inc. - DLG 03313

[Protest of Subcontract Award by Prime Government Contractor]

DIGEST:

1. Where prime contractor procures system for installation in Government-owned, contractor-operated plant, subcontract award is made "for" Government and protest will be considered.
2. Even if quoter relied on unauthorized oral statement that it need not comply with terms of prime contractor's RFQ and submitted quote proposing other than what was specified in RFQ, such reliance was misplaced.
3. Where protester merely shows that some personnel of prime contractor thought its quote was technically superior, but these personnel did not have decision-making authority, and prime's final evaluation shows otherwise, protester has not shown that technical evaluation was arbitrary or capricious.
4. Where protester quotes on part but not all of system described in prime contractor's RFQ, mere allegation that prime incorrectly estimated additional cost of purchasing remainder of system as well as maintenance is insufficient to support allegation that cost was improperly evaluated.
5. Mere allegations that "certain individuals would testify" that prime contractor acted in bad faith towards protester and that confidentiality of protester's quote was compromised do not satisfy burden of proof on protester.

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6. Where decision to award subcontract to firm other than protester was not found to be improper, Government approval of award prior to resolution of GAO protest and Government approval of subcontract award after rather than before award are procedural defects not affecting award.

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BACKGROUND

AGG 01414 — By telegram dated November 2, 1978, Rolair Systems, Inc. (Rolair), protested the proposed award of a subcontract by Chrysler Corporation (Chrysler) as prime contractor for the United States Army. Chrysler had been awarded facilities contract DAAK-30-77-C-0009 by the Army Tank-Automotive Research and Development Command for the development of a Government-owned site for XML tank system production. Pursuant to this contract, Chrysler issued request for quotations (RFQ) 0054 for either seven assembly line drag conveyor systems, or, alternately, seven air pallet assembly systems.

The RFQ provided that award would be based on the overall evaluation of nonrecurring costs for the system and Chrysler's installation costs, recurring costs based on Chrysler's estimate of maintenance and labor costs, the projected delivery schedule, and technical capabilities. The sum of the above costs would establish the total program cost which would be the final criteria for evaluation. Thus, those quotes which met Chrysler's technical and delivery schedule needs would be examined and compared on the basis of initial and recurring costs.

Originally, the deadline for submission of quotations was July 28, 1978. Chrysler later extended that deadline to August 11, then August 18, and, finally, August 25.

After evaluating the quotations, on December 28, 1978, Chrysler notified the Army contracting officer of its intent to award the subcontract to Acco Industries, Inc. (Acco), and requested approval of the

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proposed award, as required by the applicable regulations. On February 2, 1979, prior to receipt of Government approval, Chrysler awarded the subcontract to Acco. The Government first became aware of this award on February 26 and on March 2 told Chrysler that the latter had sole responsibility for the contract. Chrysler refused to accept sole responsibility and advised the contracting officer that unless it received authorization, the award to Acco would be canceled. The contracting officer ratified the Acco award on April 3.

For the reasons discussed below, Rolair's protest of that award is denied.

JURISDICTION

Because Rolair's protest concerns the award of a subcontract by a prime Government contractor, a threshold question is raised as to whether it should be considered by our Office.

In Optimum Systems, Incorporated - Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166, we held that this Office would entertain only certain types of protests concerning the award of subcontracts by prime contractors including awards made by prime contractors acting under those cost-type management contracts and such other cases where we find the contractor's award was made "for" an agency of the Federal Government.

X Here, the subcontract was awarded by a prime contractor managing a Government-owned, contractor-operated plant. Therefore, the subcontract award was "for" the Government and we have jurisdiction to consider this protest.

THE PROTEST

X At the outset, we note that in a bid protest, the protester has the affirmative burden of proving its allegations. Where the agency and the protester dispute facts in issue, mere assertions of these facts by the protester will not satisfy this

burden. NGC Investment & Development Corporation, d.b.a. Nieman Glass & Paint, B-194523, August 2, 1979, 79-2 CPD 76.

A. Technical Superiority

Although the solicitation requested quotes for seven production lines, Rolair offered only six (air pallet systems). Rolair contends, however, that because it was told orally by Chrysler employees to bid on only six, its quote was nonetheless acceptable.

In spite of the fact that Rolair offered only six rather than seven lines, Chrysler evaluated and considered the quote. Therefore, it is not clear that Rolair was rejected as unacceptable due to an insufficient number of lines. Although the record is not clear on this point, even if Rolair received oral permission to offer only six lines, the RFQ specifically provides that such informal oral advice is not binding on Chrysler. Therefore, any reliance on such oral advice was misplaced.

Rolair alleges that its quote was "technically complete and superior" and refers to a chart prepared by Chrysler summarizing the technical capability of the various proposals and minutes of a meeting of Chrysler personnel at which favorable comments were made about the Rolair system. Rolair also implies that Chrysler's technical evaluation was tainted somehow because certain Chrysler personnel were not involved in the technical evaluation process.

Chrysler denies this and refers to its final evaluation of the proposals wherein the systems' strengths and weaknesses were compared and ranked. Its November 14, 1978, technical evaluation rejects the air pallet systems proposed by Rolair based on an assessment of Rolair's submissions and the performance of air pallet systems at other installations. The Army concurred in this decision. Chrysler also notes that the personnel referred to by Rolair were not in the department with authority to issue the subcontract and, therefore, their exclusion from the evaluation and decision-making process was not irregular or improper.

We have consistently held that it is not the function of this Office to evaluate proposals or to substitute our judgment for that of contracting officials. The relative desirability and technical adequacy of proposals are matters within the discretion of the procuring activity and we will not substitute our judgment absent a showing that it acts arbitrarily or capriciously. Nanex Systems Corporation, B-193252, February 14, 1979, 79-1 CPD 105. Rolair has merely stated that some Chrysler personnel had favorable reactions to its proposal. In so doing, it falls far short of its burden of proving that Chrysler acted arbitrarily or capriciously in its technical evaluation.

B. Price

Rolair contends that Chrysler improperly evaluated the purchase and maintenance prices for its system and that, but for this flaw, Rolair's quote would have been low.

Rolair's quote for six of the seven lines for which Chrysler requested quotations was low. To determine its total initial cost should Rolair be selected, Chrysler added the lowest cost of the seventh line included in the other proposals, and, when so evaluated, Rolair's quote was not low. Rolair believes, from the information supplied by Chrysler personnel, that by any cost comparison arrived at by adding a seventh line, it would still have been low.

Chrysler has denied this allegation. Moreover, Rolair did not offer any specific cost data to support its claim that its own offer was improperly evaluated. Similarly, while Rolair claims that the total maintenance costs for its system are lower than for the other systems proposed, and offers several statements explaining why it believes this to be the case, it offers no specific cost information in support of this. Therefore, it has failed to meet its burden of proof and we cannot now find that its quote was improperly evaluated or low.

A C. Bad Faith

Rolair contends that Chrysler acted in bad faith because, inter alia, certain key Chrysler personnel directed that there be no consideration of Rolair's quote, that all layout drawings referring to Rolair equipment be redone, and that any favorable references to Rolair in minutes of Chrysler meetings be expunged. Chrysler denies all of these claims.

As support for these contentions, Rolair states that certain Chrysler personnel would testify to their truthfulness, but no such testimony was ever submitted to this Office by affidavit, letter, or in any other form. We fail to see how this statement rises to the level of "proof" and thus are left merely with Rolair's allegations, which have been denied by Chrysler. As we have already noted, such contested allegations do not satisfy a protester's burden of proof and Rolair's claim of bad faith must be rejected. NGC Investment & Development Corporation, d.b.a. Nieman Glass & Paint, supra.

D. Disclosure of Rolair Quotation

Throughout its submissions concerning this protest, Rolair refers to the postponements in the opening date and implies that the confidentiality of its quote was compromised.

Rolair notes that after the quote was submitted on August 17 (1 day before the scheduled opening), it was told by a Chrysler representative that there would be no more extensions to the opening date. Rolair was informed the next day that opening had been postponed until August 25. At that time, Rolair advised Chrysler:

"I view this as highly irregular. [Chrysler] knew that I did not want to submit my bid until the deadline to protect its confidentiality. I would have taken it with me and returned it to you on the 25th of August 1978; if you had properly informed me of the extension."

In reply, Chrysler states that the quote was not opened on August 17 but, instead, Rolair took back its unopened quote and resubmitted it on August 25. Chrysler further states that the first time that Rolair's quote was opened was on August 28 and that it was not improperly disclosed prior to that time.

Rolair never refutes directly Chrysler's reply. Instead it continues to characterize the procedure as "highly irregular." Inasmuch as Rolair merely implies that the confidentiality of its quote could have been compromised, but fails to offer any explanation or proof, and Chrysler denies all such charges, we cannot find that the confidentiality of its quote was compromised.

E. Other Matters


Rolair also refers to other matters as bases for its protest principally that the Army violated our Bid Protest Procedures, 4 C.F.R. § 20.4 (1979), by approving the award to Acco prior to resolution of Rolair's protest, and that Chrysler failed to obtain the required governmental approval prior to award of the subcontract.

Inasmuch as our Office has not concluded that the decision to award the subcontract to Acco was improper, we find that the Army approval while the protest was pending and the postaward approval are procedural defects which have not been shown to prejudice Rolair and do not affect the validity of the award to Acco.

The fact that the Government approved this subcontract after rather than prior to award deserves comment. Nothing in the record indicates that the Government felt that award should be made to Rolair. The Government's contracting officer concurred with Chrysler's decision that Acco's was the lowest acceptable quote. The only reason that the contracting officer did not approve the subcontract was because Rolair had a protest pending at that time.

CONCLUSION

Accordingly, the protest is denied.

A handwritten signature in cursive script that reads "Milton J. Fowler". The signature is written in dark ink and is positioned above the typed name.

For The Comptroller General
of the United States