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DECISION



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

FILE: B-197933, B-197945 DATE: June 11, 1980

MATTER OF: ⁴⁾²³ Century Industries, Inc.

Protest of Air Force Contract Award

DIGEST:

1. Protest filed with contracting agency and GAO subsequent to protester's receipt of information furnished in response to Freedom of Information Act (FOIA) request is dismissed as untimely filed where basis of protest was or should have been known prior to receipt of information.
2. Protest to contracting agency on basis of information received in response to FOIA request filed more than 10 working days after protester's receipt of information was untimely filed with agency, rendering subsequent protest to GAO untimely and not for consideration on merits.
3. Proper rejection of offer as unreasonably low requires determination that offeror is nonresponsive as opposed to non-responsive. Practice of "buying in" is not illegal and Government may not withhold or disturb award merely because low offer is below cost.

Century Industries, Inc. (Century), protests against the award by the Department of the Air Force of two contracts to Wheeler Brothers, Inc., for Contractor Operated Civil Engineer Supply Stores at Wurtsmith and Seymour Johnson Air Force Bases under requests for proposals (RFP) Nos. F20603-79-R-0003 (RFP 0003) and F31610-79-R-0007 (RFP 0007), respectively.

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The Air Force made award under RFP 0003 on November 14, 1979, notified the protester of the awardee and the estimated amount of the award by letter dated November 23, 1979, and notice of the award was published in the Commerce Business Daily on December 5, 1979. Upon receipt of the notice of award on November 28, 1979, Century requested a copy of Wheeler's best and final offer from the Air Force pursuant to the Freedom of Information Act (FOIA), which it received on February 11, 1980. Two days later Century initiated a protest with the agency, and its protest on the same grounds was filed with our Office on February 28, 1980.

Century contends that Wheeler's proposal should have been rejected as nonresponsive because the firm's low proposal price indicated that Wheeler must have disregarded the requirements of the RFP and the unit or item prices offered are so low as to render the firm's motivation to perform suspect. Contrary to the Air Force's position, Century asserts that the protest was timely filed with the contracting agency within 10 days of receipt of the information provided in response to its FOIA request and that the subsequent protest to our Office was filed within a reasonable time after its initial protest was filed with the Air Force.

Our Bid Protest Procedures require that a protest be filed not later than 10 working days after the basis for protest is or should have been known. 4 C.F.R. § 20.2(b)(2) (1980). If, as the protester contends, the amount of Wheeler's proposal price indicated that the firm's offer must be technically unacceptable, it should also have sufficed to apprise Century of the basis of its protest. We therefore concur in the agency's view that Century knew or should have known the basis of its protest concerning RFP 0003 by November 28, 1979, upon receipt of the agency's notice of award from which it decided to make an FOIA request, and certainly within a reasonable period after the December 5 publication of the award in the Commerce

Business Daily. Delphi Industries, Inc. 58 Comp. Gen. 248 (1979), 79-1 CPD 67. That the protester, having examined Wheeler's price proposals, now objects to the award on the basis of the firm's purportedly unreasonably low unit prices does not, in our opinion, change the fact that Century's protest is based on the contention that Wheeler's proposal was unreasonably low which Century indicates was as apparent from the lump sum offer information it had in 1979 as it was from the unit price information subsequently obtained in February 1980. See Davey Compressor Company, B-195425, November 14, 1979, 79-2 CPD 351.

But even if the protest were timely, it would not be for our consideration. Proper rejection of an offer as unreasonably low requires a determination that the offeror is nonresponsible as opposed to nonresponsive. See Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD 169. Every award, however, imports an affirmative determination of the successful offeror's responsibility. Advertising Distributors of Washington, Inc., B-187070, February 15, 1977, 77-1 CPD 111. Moreover, our Office does not review protests against affirmative determinations of responsibility unless either fraud is shown on the part of the procurement officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Advertising Distributors of Washington, Inc., supra.

Award under RFP 0007 was made to Wheeler on October 25, 1979, and Century made a FOIA request on October 30, 1979, for information concerning the offerors' proposals. Part of the information, including Wheeler's initial and final price proposals, was released on December 7, 1979, and information concerning the other offerors' proposals was released on February 4, 1980. Century protested to the Air Force by letter dated February 20, 1980; the Air Force received Century's letter on February 25, and responded on the next day denying the protest as untimely and without merit. Century filed its protest with our Office on February 28, 1980.

Century contends that, in addition to being non-responsive, Wheeler's low offer constitutes a "buy-in" and that therefore the contract should be terminated and the Air Force's requirements resolicited. Century asserts that its protests to the Air Force and our Office were timely filed within 10 working days of receipt of the agency's response to its FOIA request and the agency's denial of its initial protest.

Our Bid Protest Procedures provide that a protest must be timely filed with our Office within 10 working days of the initial adverse agency action following a timely protest to the contracting agency. 4 C.F.R. § 20.2(a) (1980). If, as Century contends, Wheeler's proposal prices indicated the alleged deficiencies in the firm's proposal, we concur with the Air Force that the protester knew or should have known the basis of its protest upon receipt of the documents provided by the agency in early December 1979, requiring a protest to the agency within 10 working days. Consequently, we agree with the contracting officer's decision that the initial protest was not timely filed with the agency, a prerequisite to our consideration of the protest now before us.

Also, even on a timely basis, a protest of the possibility of a "buy-in" is not a proper ground upon which the validity of an award may be challenged. Inter-Con Security Systems, Inc., B-189165, June 15, 1977, 77-1 CPD 434. Although "buying in" is discouraged, the practice is not illegal and the Government may not withhold or disturb an award merely because the low offer is below cost. See Defense Acquisition Regulation § 1-311 (1976 ed.); Allied Technology, Inc., B-185866, July 12, 1976, 76-2 CPD 34.

The protests are dismissed.

Henry R. Jan Chase
for Milton J. Socolar
General Counsel