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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D. C. 20548

FILE: B-200846, B-200847,
B-200847.2, B-200848 DATE: March 13, 1981

MATTER OF: Bob McDorman Chevrolet, Inc. and
Jack Roach Cadillac

DIGEST:

1. [Protest that contracting activity improperly found ~~automotive parts supplier~~ ^{Awardee firm} to be responsible] is dismissed since protest does not allege either failure to comply with definitive responsibility criterion found in solicitation or fraud or intentional misconduct by contracting officials.
2. GAO role in protest concerning status of awardee as regular dealer under Walsh-Healey Act is limited to considering whether or not contracting officer complied with procedural requirements.
3. Contracting officer's failure to refer protest concerning awardee's status as regular dealer under Walsh-Healey Act to Department of Labor was not prejudicial to protester where protester was afforded opportunity to request such referral and does not appear to have pursued matter.

Bob McDorman Chevrolet, Inc. and Jack Roach Cadillac protest the award of two contracts to Metro Automotive Parts stemming from request for proposals DLA 700-79-R-7052 issued by the Defense Logistics Agency (DLA). The protesters are franchised Chevrolet parts dealers. The solicitation and two contracts awarded Metro provide for DLA requirements for Chevrolet Division, General Motors Corporation replacement parts. Metro is not a franchised Chevrolet parts dealer although it does have access to General Motors parts as an AC-Delco "independent authorized wholesaler." AC-Delco is a division of the General Motors Corporation.

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Citing what they view as undue reliance on an inadequate preaward survey, the protesters argue that Metro is unable to perform the contracts (which require factory approved parts) and should have been found to be non-responsible. According to the protesters, Metro has bought into the contract below the cost anyone other than a franchised Chevrolet dealer will have to pay for parts. Bob McDorman Chevrolet believes that, at minimum, the contracting officer should have referred the question of Metro's responsibility to the Small Business Administration (SBA) by requesting a Certificate of Competency (COC). Jack Roach Cadillac also asserts that Metro falsely certified that it was a regular dealer for purposes of the Walsh-Healey Act.

The parties' arguments principally focus on a variety of real or perceived technical deficiencies in DLA's request for a preaward survey, in the conduct of the preaward survey and in the contracting officer's finding that Metro was responsible. This Office, however, does not review protests against affirmative determinations of responsibility unless the solicitation contains a definitive responsibility criterion which was not applied or unless fraud or intentional misconduct by procuring officials is alleged. Marine Power & Equipment Company, B-199445.2, August 15, 1980, 80-2 CPD 125.

Fraud or intentional misconduct by DLA personnel is neither alleged nor proved.


Definitive responsibility criteria involve specific, and objective special standards of responsibility, compliance with which is a necessary prerequisite to award, i.e., they cannot be waived by the contracting officer. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. The requirement to be a franchised Chevrolet dealer would be such a criterion, for example. No such requirement is present in the solicitation.

With respect to McDorman's view that the contracting activity should have initiated the COC process, we note that the COC procedure is invoked only if the contracting activity determines that a small business offeror is nonresponsible. Defense Acquisition Regulation (DAR) § 1-703.4(c). Since Metro was found to be responsible, no referral to SBA could have been made.

Concerning the protesters' view that Metro's price is unreasonably low and is in effect a "buy-in," acceptance of unreasonably low or even below-cost offers by the Government is not illegal and, therefore, the possibility of a "buy-in" does not provide a basis upon which an award may be challenged if the contracting activity has not made a determination of nonresponsibility. Fermont Division, Dynamics Corporation of America; Onan Corporation, B-195431, June 23, 1980, 80-1 CPD 438.

Finally, Jack Roach Cadillac's contention that Metro is not a regular dealer under Walsh-Healey will not be considered since a determination as to whether a small business firm is a manufacturer or regular dealer under the Walsh-Healey Act rests in the first instance with the contracting agency subject to final review by the SBA or the Secretary of Labor as appropriate. MISSO Service Corporation, B-197373, June 19, 1980, 80-1 CPD 432. Our role in these cases is therefore limited to considering whether the contracting officer has met his regulatory procedural responsibilities under the Act. See F & H Manufacturing Corp., B-197341, March 31, 1980, 80-1 CPD 240. In this respect, the record indicates that the contracting officer did review the protester's complaint pursuant to DAR § 12-604(c), denied the complaint, and advised Jack Roach Cadillac in writing that the matter would be forwarded to the Department of Labor (DOL) if the protester indicated that it wished to have this done in the face of its protest to our Office. While the matter should have been forwarded to DOL automatically as required by the regulation, we think the contracting officer's failure to do so was not prejudicial to the protester since there is no indication that Jack Roach Cadillac pursued the matter any further. We therefore will not object to this procedural deficiency.

The protest is dismissed in part and denied in part.


Acting Comptroller General
of the United States