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DECISION

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

118242

FILE: B-205483

DATE: April 26, 1986

MATTER OF: Line Fast Corporation

DIGEST:

1. Protest is timely and for consideration on the merits where filed in GAO within 10 working days after the protester learned that its timely protest to the procuring agency had been denied.

2. Agency may waive a first article test (FAT) requirement even if the bidder fails to submit with its bid copies of a prior FAT report, requested by the IFB, where the agency is already in possession of the report; eligibility of a bidder for waiver of a FAT requirement concerns bidder responsibility, a determination of which ordinarily may be based on information available to the contracting officer any time prior to award.

3. Where the agency and protester disagree as to the freight charges which should have been added to the protester's bid for evaluation purposes, but the protester has furnished no direct, independent evidence that the charges calculated by the agency are incorrect, the protester has failed to meet its burden of affirmatively proving its case.

Line Fast Corporation protests the award of a contract to American Air Filter Company under invitation for bids (IFB) No. DLA700-81-B-1893, issued by the Defense Logistics Agency (DLA) for 65 pieces of shelter equipment. Line Fast objects to the award on the ground that DLA improperly determined American to be the low bidder. Specifically, Line Fast contends

that American should not have been granted a first article test (FAT) waiver, and that DLA incorrectly calculated freight charges in evaluating Line Fast's bid. For the reasons explained below, we deny the protest.

The IFB required bidders to bid on both an FOB origin and an FOB destination basis, award to be made on whichever basis would result in the lowest total cost to the Government. Award would be based on the FOB origin bid prices, for example, if after factoring in the Government's freight costs the total price would be lower than the FOB destination bid prices.

Only Line Fast and American submitted bids. By telegram of September 3, 1981, the Engineering Support Activity advised the contracting officer that the FAT requirement could be waived for American, which had specified in its bid a $37,500 charge for FAT. The contracting officer granted the waiver, thereby reducing American's bid by the $37,500 FAT charge. It then was determined that the FOB destination prices were higher than the FOB origin prices even after freight costs were added, so the bids were evaluated on an origin basis. Although Line Fast's raw bid price of $293,101.28 was lower than American's reduced bid of $294,715, American became the low evaluated bidder after freight charges were considered. The evaluated prices were as follows:

| | FOB origin price without freight | FOB origin price with freight |
|---|---|---|
| American | $294,715 | $313,162.90 |
| Line Fast | $293,101.28 | $315,829.53 |

Award was made to American on October 9, 1981 based on its lower evaluated price.

As a preliminary matter, DLA argues that Line Fast's protest should be dismissed as untimely since it was not filed in our Office until November 12, more than 10 days after October 16, the latest date Line Fast could have learned of the award. The protest is timely. Under our Bid Protest Procedures, where a timely protest has been filed initially with the contracting officer, the protester has 10 working days after learning of the rejection of its protest (i.e., initial adverse agency action) to then file a protest in our Office. 4 C.F.R. § 21.2(a) (1981). This was the course Line Fast followed here. Line Fast learned of the award on October 14, protested to DLA by telex of October 16 and letter dated October 23, and was informed of the denial of its protest by letter dated October 28. Even assuming that Line Fast received this denial the same day it was sent, its protest to our Office was timely filed; November 12, the day the protest was received, is precisely 10 working days (November 11, Veterans Day, is a Federal holiday) after October 28. Accordingly, we will consider the protest on the merits.

Line Fast first contends that it was improper for DLA to waive the FAT requirement for American because, contrary to the terms of the waiver provision in the IFB, American did not submit with its bid two copies of a previous FAT report approving the same or a similar article for another contract. Line Fast does not maintain that American was otherwise not eligible for the waiver. DLA responds that since American had in fact passed a FAT on a 1978 DLA contract for the same item required here, and DLA was in possession of the FAT report, American was eligible for a FAT waiver even though it failed to submit the requested data. It is DLA's position that the Government is not required to forego the cost savings which flow from a FAT waiver merely because a bidder fails to furnish requested information which is already in the Government's possession. We agree.

Our Office has consistently held that even where, as here, a bidder fails to submit information required by the solicitation to qualify for a FAT waiver, an agency nevertheless may grant such a waiver based on other information not submitted with the bid. Bruno-New York Industries Corp., 59 Comp. Gen. 512 (1980),

80-1 CPD 388; TM Systems, Inc., B-203156, December 14, 1981, 81-2 CPD 464. This is because FAT information concerns a bidder's responsibility, that is, its ability to satisfactorily perform the contract. TM Systems, Inc., supra. Such information need not be furnished with the bid. Indeed, a contracting officer generally may base responsibility determinations on any relevant information available prior to award. See, for example, Pope, Evans and Robbins, Inc., B-200265, July 14, 1981, 81-2 CPD 29. The mere fact that a solicitation may require that FAT information be submitted with the bid does not change the nature of that information as relating to bidder responsibility; a bidder's failure to comply with this information requirement will not preclude waiver of the FAT where other information available to the contracting officer prior to award indicates the bidder qualifies for a waiver.

Here, although American did not furnish the requested two copies of a FAT report, DLA already was in possession of a report indicating that American had satisfactorily constructed and supplied 220 units of the same shelter equipment under contract No. DLA700-78-C-8192. The determination to waive the FAT requirement for American was based on this report. In view of the principles discussed above, we find no basis for objecting to this determination.

Line Fast also maintains that DLA applied the wrong rates in determining the Government's freight charges for evaluation purposes. More specifically, Line Fast contends that its bid, with freight costs added, would have been low had DLA applied the rates of either Southern Railway or Ryder Ranger Trucking instead of those of Aero Transport. It fails to understand, furthermore, why its bid was evaluated using truck rates while the commonly less expensive rail rates were applied to American's bid.

DLA states in reply that truck rates were used on Line Fast's bid because they were lower than the available rail rates. It explains that since Southern does not have a quotation (usually the lowest rate available) on file with the Military Traffic Management Command (MTMC), only

"commodity rates" and the much higher "class rates" were available here. The rate supplied by Line Fast was a commodity rate, which applies for "knocked down" commodities only. DLA states that the shelters here were not knocked down, and that the higher class rate therefore applied. The quotation for Aero was used because it was lower than this class rate. DLA similarly explains that while the Ryder truck rate supplied by Line Fast was essentially correct, it did not take into account an applicable 18 percent fuel surcharge. With this charge added in, the Ryder truck rate was approximately $19 per truck greater than Aero's. DLA concludes that Line Fast's bid was evaluated using the lowest available freight rates.

DLA's explanation notwithstanding, Line Fast steadfastly maintains that the wrong freight rates were applied to its bid. It states in a December 4, 1981 letter to DLA that, according to Southern, the class rate referred to by DLA is for a general commodity description not relevant here, and that the rate quoted by Southern does not require that the items be knocked down. It advised further that both Southern and Ryder had reconfirmed their lower rates.

It is well established that the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 382. Where conflicting statements of the protester and contracting agency constitute the only available evidence, the protester has not met this burden of proof. Arsco International, B-202607, July 17, 1981, 81-2 CPD 46; Del Rio Flying Service, Inc., B-197448, August 6, 1980, 80-2 CPD 92. We believe this is the case here. In direct response to Line Fast's contention that the rates it obtained from Southern and Ryder should have been applied to its bid, DLA fully documented both the manner in which the freight rates used were calculated, and the reasons why the rates relied upon by Line Fast would not govern the shipment in question. Line Fast has challenged the explanation offered by DLA based solely on its own account of undocumented discussions it had with Southern and Ryder; it has submitted no direct, independent evidence which clearly proves that DLA relied on the wrong

rates.[1] Such unsupported self-serving statements are not sufficient to satisfy the protester's burden of proof. Kramer Associates, Inc., B-197178, July 16, 1980, 80-2 CPD 33. On this record, therefore, we find no basis for sustaining the protest.

Line Fast further challenges the freight rates calculated by DLA on the ground that an overheight charge should not have been applied. This additional per mile charge was improper, Line Fast argues, since only items higher than 0 feet, 6 inches high are considered overheight, and the item here was only 8 feet high. According to DLA, however, overheight charges can be assessed on any item in excess of 8 feet in height, depending on the carrier. Such charges also may be applied where the combined height of the item and trailer would exceed 13 feet, 6 inches, since the carrier ordinarily must then purchase special permits. Here, DLA reports, it was determined that the items would be subject to an overheight charge if shipped by Aero. The Aero rate was still used because, even considering this charge, Ryder's truck rates were

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[1] Line Fast contends that at the February 2, 1982 conference on the merits of this protest, our Office refused to accept copies of letters from Southern and Ryder setting forth their purportedly lower freight rates. Our investigation into this allegation indicates it has no basis in fact; if Line Fast in fact had evidence supporting its position, it could have and should have furnished it with its comments on DLA's report, at the conference, or in its comments on the conference. In any event, the fact that these written rates were not submitted has no bearing on our denial of this portion of the protest. Indeed, we think the record does show that Southern and Ryder supplied Line Fast with these lower rates. Our decision is based solely on Line Fast's failure to adequately rebut DLA's explanation of why these lower rates did not apply to the shipment in question.

higher,[2] Again, Line Fast has furnished no direct evidence that Aero would transport the items without assessing an overheight charge. We therefore find no basis upon which to sustain the protest.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States

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2 Although Line Fast claims the items are only 8 feet high, the estimated height set forth by DLA in the IFB was 100 inches (8 1/3 feet). Line Fast left blank a space provided for bidders to list different guaranteed dimensions and instead, immediately below DLA's estimates, wrote in the same numbers--including the 100 inch height--set forth as DLA's estimates. Under these circumstances, we believe the contracting officer reasonably relied on the estimated dimensions in determining whether an overheight charge would apply.