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DECISION

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

FILE: B-210043 **DATE:** June 27, 1983

MATTER OF: Jack Roach Cadillac, Inc.

DIGEST:

1. Offer that does not include statement required by RFP about how the offeror will meet the delivery schedule of a contract to supply the Defense Department with replacement automotive parts, e.g., from existing stock or wholesale distributors, did not have to be rejected as technically unacceptable, as a competitor argues, since the submission of the statement was not a prerequisite to a finding of technical acceptability.

2. GAO will not question an affirmative responsibility determination absent a showing of possible fraud or bad faith by Government officials, or that definitive responsibility criteria were not met. To show bad faith, a firm must proffer virtually irrefutable evidence that officials acted with malicious and specific intent to injure the firm, which has not been done here. Also, solicitation request for dealer status, sources of supply, and nature and value of inventory does not establish definitive criteria, but rather involves only the kind of information normally used by contracting officials to determine an offeror's responsibility in general.

3. GAO will not consider complaint that a firm is not a regular dealer under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1976). By law, such matters are for determination by the contracting agency in the first instance, subject to final review by the Small Business Administration (if a small business is involved) and the Secretary of Labor.

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Jack Roach Cadillac protests the proposed award of a contract to H&S Industrial Parts, Inc. under request for proposals (RFP) No. DLA-700-82-R-0400 issued by the Defense Logistics Agency (DLA). The solicitation requested proposals to supply Chevrolet Division, General Motors Corporation replacement parts to meet Department of Defense requirements. Roach contends that award to H&S would be improper on the following grounds:

1. H&S' proposal is not technically acceptable;

2. H&S is not a responsible offeror; and

3. H&S is not a regular dealer under the Walsh-Healey Public Contracts Act.

We deny the protest in part and dismiss it in part.

Background

The solicitation was issued on November 25, 1981 for offers on a requirements contract for automotive replacement parts manufactured or supplied by the Chevrolet Division, General Motors Corporation. Eight offers were received, and H&S was the low offeror for both Zone A (East Coast) and Zone B (West Coast). A pre-award survey of February 23, 1982, however, recommended that no award be made to H&S because of that firm's unsatisfactory contract performance record and questionable ability to meet the solicitation's delivery schedule requirements. The contracting officer therefore determined H&S to be nonresponsible, but referred the matter to the Small Business Administration (SBA) under the Certificate of Competency procedures in accordance with Defense Acquisition Regulation (DAR) § 1-705.4(c) (1976 ed.). The SBA issued a certificate for H&S on April 7, 1982.

By letter of May 7, 1982 Roach alleged that H&S was not a responible contractor and that it did not qualify as a regular dealer under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1976). On May 14, DLA informed Roach that the responsibility issue had been resolved by the SBA's issuance of the Certificate of Competency and that the issue of Walsh-Healey eligibility would be considered.

H&S' Certificate of Competency expired on June 7, before any contract could be awarded, and in a June 8 letter Roach objected to its revalidation, and further objected to any determination that H&S was a regular dealer under Walsh-Healey.

On June 24, amendment No. 0003 to the solicitation was issued making a number of significant changes in the requirements, and at the July 9 closing date for responses to that amendment, H&S was the low offeror on Zone B, and second low on Zone A. The low offeror on Zone A was Metro Automotive Parts (Metro).

By August 23 letter, Roach supplemented its earlier protests by raising certain allegations regarding H&S' integrity as a responsible contractor.

After pre-award surveys of both H&S and Metro, DLA concluded that both firms were regular dealers under Walsh-Healey. The contracting officer, however, requested another pre-award survey of H&S. DLA then informed Roach of the Walsh-Healey finding and that another pre-award survey of H&S had been requested. Roach protested the Walsh-Healey determination, which was then referred to the Administrator of the Wage & Hour Division of the Department of Labor for a final determination. We are informed that a final affirmative determination of H&S' eligibility as a regular dealer was made on February 8, 1983.

The pre-award survey team recommended that complete award be made to H&S, but DLA has not yet made a final responsibility determination. Metro was determined to be nonresponsible, and this determination was referred to SBA, which in turn declined to issue a Certificate of Competency. Therefore, Metro is ineligible for award.

Issues

1. Technical Acceptability

Roach alleges that the H&S proposal is technically unacceptable because H&S failed to submit with its offer a statement required by section L of the RFP as to how the firm would meet the solicitation's delivery schedule, e.g., from existing stock, wholesale distributors, etc. The delivery schedule demands that 75 percent of all automotive supplies be delivered within 16 days after the date of

order, 90 percent within 20 days, and 100 percent within 30 days.

DLA responds that is did not consider the statement a matter of a proposal's technical acceptability, but instead viewed the statement as relating to an offeror's responsibility, that is, the firm's ability to meet its obligations if awarded the contract. (The agency states that it did not expect to receive different technical approaches to meeting its needs.) Since material relating to responsibility can be furnished any time before award, DLA accepted H&S' submission of the statement after the firm submitted its offer.

We do not object to DLA's action. While the agency's reported characterization of the requirement in issue as a responsibility matter was not clear from the solicitation itself, the RFP also did not establish the requirement for the statement as a prerequisite to a finding of technical acceptability. We therefore cannot conclude that the agency was compelled to reject H&S' offer for lack of the statement. The record is clear that DLA was convinced that H&S' proposal was accceptable, and the firm properly is in line for award according to the RFP's evaluation scheme. Under the circumstances, we cannot agree with Roach that DLA had to reject H&S' offer for the reason argued.

2. H&S as a Responsible Offeror

Roach has raised certain allegations that H&S lacks the integrity to perform the contract, and that DLA contracting officials have shown bad faith in not considering those allegations. Although DLA has not yet made a responsibility determination regarding H&S, an affirmative decision is anticipated by all parties. We will not review an affirmative determination of responsibility absent a showing of fraud or bad faith on the part of Government contracting officials, or a showing that definitive responsibility criteria in the solicitation were not met. Keco Industries, Inc., B-204719, July 6, 1982, 82-2 CPD 16.

a. Fraud or Bad Faith

Roach has not alleged fraud on the part of DLA contracting officials. To show bad faith, Roach must meet the heavy burden of submitting essentially irrefutable proof that those contracting officials had the malicious and specific intent to injure Roach. Arlandria Construction Co., Inc., B-195044, B-195510, April 21, 1980, 80-1 CPD 276; Bradford National Corporation, B-194789, March 10, 1980, 80-1 CPD 183. We see no evidence of bias on the part of DLA either in favor of H&S or against Roach, much less any quantum of evidence approaching the stated standard. The allegations that H&S lacks integrity have been referred to DLA's Inspector General for investigation. Indeed, the record clearly shows that DLA contracting officials have consistently referred Roach's allegations to the proper investigatory forum. Under the circumstances, we find Roach's contention that DLA has acted in bad faith without merit.

b. Failure to Meet Definitive Responsibility Criteria

Roach contends that H&S failed to meet definitive responsibility criteria found in section K of the solicitation. Definitive responsibility criteria are objective standards included in a solicitation establishing a measurement by which the prospective contractor's ability to perform the contract may be judged. These special standards put firms on notice that the class of prospective contractors is limited to those who meet specified qualitative or quantitative qualifications deemed necessary for adequate contract performance. Watch Security, Inc., B-209149, October 20, 1982, 82-2 CPD 353.

Section K requested an offeror to fill in information regarding: (1) whether or not it was a franchised dealer or distributor (and if it was, to attach a copy of the manufacturer's designation of the offeror as an authorized dealer); (2) how long it had been a dealer; (3) the proposed sources of supply; (4) how many items required by the solicitation were in stock; and (5) the inventory value of the stock. Roach alleges that the information supplied by H&S was false and, therefore, that H&S failed to meet those definitive responsibility criteria. We find no merit to Roach's argument.

The information required by section K is the kind typically used by contracting officers in forming judgments as to whether firms are responsible; section K does not, however, establish any "definitive" or objectively determinable criteria. See Echelon Service Company, B-209284.2, December 2, 1982, 82-2 CPD 499. An example of a definitive responsibility criterion for this solicitation would have been the requirement that any offeror establish that it is a franchised General Motors dealer. As we pointed out to Roach in an earlier decision, and as we emphasize here, no such objective standard is present in DLA's solicitation for this requirement. Bob McDorman Chevrolet,Inc. and Jack Roach Cadillac, B-200846, B-200847, B-200847.2, B-200848, March 13, 1981, 81-1 CPD 194. Consequently, we reject Roach's contention that H&S did not meet definitive responsibility criteria.

Our analysis above has been based on the premise that DLA will make an affirmative determination of responsibility. Should DLA find H&S to be nonresponsible, the matter will be referred to the SBA for a Certificate of Competency. If the SBA issues such a certificate, we will not review that determination since, by law, SBA has conclusive authority to certify whether a small business is responsible. Aspen Reforestation, B-206144, February 4, 1982, 82-1 CPD 95. If the SBA declines to issue the certificate, then the matter is at an end, leaving H&S ineligible for award. Adak Corporation, B-209461, November 8, 1982, 82-2 CPD 418.

3. H&S as a Regular Dealer Under the Walsh-Healey Public Contracts Act

As we indicated earlier, a final affirmative determination regarding H&S' eligibility for award as a regular dealer has been made. That determination is not subject to our review. By law, such matters are for determination by the contracting agency in the first instance, subject to final review by the SBA (if a small business is involved) and the Secretary of Labor. Sunair Electronics, Inc., B-208385, August 18, 1982, 82-2 CPD 154.

The protest is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States