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DECISION



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

FILE: B-214344

DATE: July 24, 1984

MATTER OF: Andrews Tool Company

DIGEST:

1. An allegation that the procuring agency orally awarded a contract to the protester--an allegation denied by the agency--is not supported where the protester participated in negotiations and submitted a best and final offer after the time the award was allegedly made. The protester's participation in the procurement is inconsistent with its view that it had previously been awarded the contract.
2. An agency determination that an offered item is the exact product solicited will not be disturbed by this Office without a showing that the determination is unreasonable.
3. The protester has the burden of proof to support a charge of auctioneering, and the burden is not met where the only evidence is conflicting statements by the protester and agency.

Andrews Tool Company (ATC) protests the award of a contract to Air Products and Chemical Company (Airco) under request for proposals (RFP) No. DLA400-83-R-3232, issued by the Defense General Supply Center, Defense Logistics Agency (DLA), Richmond, Virginia.

We deny the protest.

The RFP requested offers to provide 36 aftercoolers for use in a charging and generating plant. These items were identified in the original procurement item description (PID) by National Stock Number (NSN) 3655-00-633-5101, Chicago Pneumatic Tool Company part number 1-352024.

Clause L16 of the RFP required offerors to state whether they were offering the exact product solicited or an alternative product. Airco's proposal stated it was offering the exact product but identified it by a manufacturer's part number other than that listed in the PID. ATC offered an alternative product.

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The agency discussed the proposals with the offerors in the fall of 1983 and requested additional product documentation from each. Data was sought from Airco to establish that the product offered was, in fact, the exact product solicited; test data was requested from ATC to determine its product's performance capabilities. Ultimately, the agency determined both offers were acceptable, added both part numbers to the procurement item description, conducted final discussions on January 10, 1984, and received best and final offers. Both Airco and ATC responded, with Airco submitting the low offer. The contract was awarded to Airco on that basis.

ATC protests the award on three bases. First, it contends that, after ATC's product had been approved, the agency's contract negotiator called and told ATC that its "proposal [had] been accepted." ATC maintains that, after this acceptance, it was inappropriate for the agency to award the contract to Airco. Second, ATC questions the procedures the agency followed in determining the acceptability of Airco's product. It suggests that, since Airco's product was not subjected to the same amount of testing as its own, the agency inadequately evaluated it. Finally, ATC alleges that the agency engaged in auctioneering during the negotiation process. No specific agency action, other than soliciting best and final offers, is identified to support this contention.

In response, the contract negotiator states that she told ATC that she "would not be able to [speak] about an award until the review process had been completed, funds obligated, and award signed."

As to the qualification of Airco's product, the agency maintains it followed the appropriate procedures for determining that Airco was offering the exact product solicited in the original PID. The agency states it relied on documentation cross-referencing Airco's part number with the part number listed on the original PID, as well as documentation of prior qualification under an earlier procurement.

Finally, the agency denies that any auctioneering took place. It states that "at no time was an offeror told of a price they must meet or informed that their price was not low in relation to another."

Regarding the alleged promise to award the contract, we conclude that the facts presented do not support the protester's contention. The agency has denied that ATC was told that its proposal had been accepted. Further, after

the conversation in question, ATC continued to participate in the negotiation process by engaging in final discussions with DLA and by submitting a best and final offer after the date the alleged award had been made. We find this action inconsistent with ATC's assertion that it believed it had previously been awarded the contract.

As to the qualification of Airco's product, we have held that the establishment of tests and procedures to determine product acceptability is within the ambit of the expertise of the cognizant technical activity, and we will not question agency decisions in those respects unless clearly shown to be unreasonable. Tyco, B-199632, Mar. 24, 1981, 81-1 C.P.D. ¶ 220.

Clause L16, paragraph "B," of the RFP establishes the procedures the agency must follow when an offeror claims its product is the exact product solicited but is manufactured by a company other than the one listed in the procurement item description. This clause requires the offeror to produce evidence "sufficient to establish the identity of the product and its manufacturing source." The issue addressed by the agency determination under this paragraph is whether the offered product is, in fact, the exact product solicited. The agency relied on two independent sources of information in making its determination of Airco's product identity. We believe the evidence reasonably supports that determination.

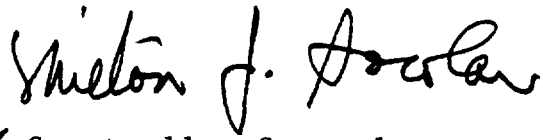
The protester apparently believes that Airco's product should have been subjected to the same type of analysis and testing as was required of its own. We do not agree. ATC's proposal offered to provide an alternative product while Airco offered the exact product solicited, though identified by a different manufacturer's part number. Paragraph "C" of clause L16 establishes the procedures an agency must follow in determining whether an alternative product is capable of performing at a level equal to the product solicited. Accordingly, the procedures in paragraph "C," under which the agency assessed ATC's product capability, differ substantially from those in paragraph "B," under which the agency determined the identity of Airco's product.

We recognize that the Tyco case dealt with an agency's ability to evaluate the technical capabilities of a product in situations where an alternative product is being offered. Nonetheless, the principle of deference to an agency's determination of technical capability is equally

applicable in situations involving an agency's determination that the product offered is the exact product solicited.

Finally, we considered ATC's charge of auctioneering. The agency denies the charge. The protester has the burden of proof, and we will not consider that burden met where the only evidence is conflicting statements by the protester and the agency. Systems Development Corporation and International Business Machines, B-204672, Mar. 9, 1982, 82-1 C.P.D. ¶ 218, at page 22. Since ATC has failed to submit any supporting evidence, we accept the agency's version of the facts.

The protest is denied.

for 
Comptroller General
of the United States