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DECISION

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

FILE: B-216113 **DATE:** May 13, 1985

MATTER OF: Clausing Machine Tools

DIGEST:

1. RFP provision requiring that offered lathe be the manufacturer's current model which is merely a part of the general specifications concerning design and performance does not preclude offeror from modifying current model to meet agency's specifications.

2. Experience of an offeror is a matter of responsibility and where contracting officer makes an affirmative responsibility determination, our Office does not review such determination except under limited circumstances not present here.

3. Agency properly excluded low offeror from evaluation under the Buy American Act where preaward survey shows that cost of foreign components do not exceed 50 percent of the cost of all components. Moreover, there was nothing improper in the agency's allowing the low offeror to change its status from manufacturer to dealer prior to award.

4. There is no requirement for a cost realism analysis where contract is on a firm fixed price basis. There is no legal basis to object to a below-cost offer if offer is found responsible, as here.

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Clausing Machine Tools (Clausing) protests the award of a contract to American Machine Tool Company (American) for 78 lathes under request for proposals (RFP) No. FD2060-84-52454 issued by Robins Air Force Base (Air Force), Georgia. The award was made to American, as the lowest responsible offeror. We deny the protest.

Responsiveness of American's Proposal

The RFP contained Military Specification MIL-L-23400C, as amended, which provided the following:

> "3.2 Design. The Lathe shall be new and one of the manufacturer's current models conforming to the accuracy requirements for an engine lathe or tool room lathe as specified herein. . . ."

Clausing contends that American's proposal was nonresponsive to the RFP because American did not offer a current model, but rather a modified version of another machine. Clausing argues that the fact American submitted a brochure of the lathe with its proposal that was marked to reflect the changes necessary to comply with the specifications shows that American's proposal was nonresponsive. Clausing contends that the specification was designed to avoid the risk associated with purchasing new machines and was intended to give guidelines on the performance of the lathes, rather than serving as the blueprint to build new machines.

The Air Force responds that American's proposal took no exceptions to the RFP and that the RFP permitted offerors to submit representative commercial manuals. The Air Force reports that neither technical proposals nor descriptive data were required by the RFP because the lathes were being purchased in accordance with an established military specification and competitive sources had been determined to exist. However, the Air Force advises that because American submitted descriptive literature, it conducted an engineering review of the literature. The review indicated that several areas were not addressed. This led the Air Force to request a preaward survey with specific emphasis on whether American could meet the specifications.

The preaward survey found that American was currently producing similar machines at a rate of 50 units per month with monthly sales of 20 units commercially. Also, the survey report stated that a visual examination was made to ascertain dimensional data of the similar lathe. The survey found that "some changes would have to be made to comply with the solicitation," but that American cleared up the differences verbally. The survey recommended award to American "based on the understanding by the contractor that he can comply and supply the lathes."

There are many cases dealing with solicitation provisions requiring a contractor to furnish a commercial product. Initially, we were of the view that such a provision required, as a condition of award, a showing that the bidder/offeror would indeed provide a commerical product, and that the provision therefore was a definitive criterion of responsibilty.[1/] See Data Test Corp., 54 Comp. Gen. 499 (1974), 74-2 C.P.D. ¶ 365, aff'd and modified, 54 Comp.

1/ A definitive responsibility criterion is a standard established by an agency for a particular procurement for the measurement of a bidder's or offeror's ability to perform the contract. In effect, the criterion represents the agency's judgment that a bidder's ability to perform in accordance with the specifications for that procurement must be measured not only against the traditional and subjectively evaluated factors, such as adequate facilities and financial resources, but also against a more specific requirement, compliance with which at least in part can be determined objectively. When such a criterion is imposed, it limits the competition to those who meet the qualitative or quantitative qualification. American Athletic Equipment Division, AMF Inc., 58 Comp. Gen. 381 (1979), 79-1 C.P.D. ¶ 216. A common example of such a criterion is a requirement that the bidder have a certain level of experience. See Otis Elevator Co., B-196618, Feb. 8, 1980, 80-1 C.P.D. ¶ 117; Continental Service Co., B-187700, Jan. 25, 1977, 77-1 C.P.D. ¶ 53; Haughton Elevator Division, Reliance Electric Co., 55 Comp. Gen. 1051 (1976), 76-1 C.P.D. ¶ 294; Yardney Electric Corp., 54 Comp. Gen. 509 (1974), 74-2 C.P.D. ¶ 376. Evidence that the bidder or offeror meets the standard usually must be furnished so that compliance with the requirement, which is a prerequisite to award, can be determined. Because compliance with a definitive criterion can be objectively determined, this Office reviews complaints that a bidder/offeror was found to be responsible despite allegedly failing to meet the criterion. Yardney Electric Corp., supra.

Gen. 715 (1975), 75-1 C.P.D. ¶ 138; Kepner Plastics Fabricators, Inc., et al., B-184451, et al., June 1, 1976, 76-1 C.P.D. ¶ 351; Coast Iron & Machine Works, Inc., 57 Comp. Gen. 478 (1978), 78-1 C.P.D. ¶ 394; Zero Mfg. Co., B-197371, Oct. 15, 1980, 80-2 C.P.D. ¶ 279. More recently, however, we have taken the position that a commercial product requirement in the specifications is not a definitive criterion of responsibility, but is like any other specification requirement bearing on the product to be furnished--the bidder or offeror must commit itself to meeting the specification requirements, but its ability to do so is encompassed by the contracting officer's subjective responsibility determination which in most cases is not subject to our review. See Harnischfeger Corp., B-211313, July 8, 1983, 83-2 C.P.D. 68; Schreck Industries, Inc., et al., B-204050, et al., July 6, 1982, 82-2 C.P.D. ¶ 14; Caelter Industries, Inc., B-203418, Mar. 22, 1982, 82-1 C.P.D. 265.

Of course, where a bidder takes exception in its bid to a commercial product requirement, the bid must be rejected as nonresponsive. See B-164885, Jan. 15, 1969, where the bidder, in its bid, proposed substantial modification to its existing product in the face of a specification requirement, also for lathes, for "the manufacturer's current commercial model." See also IFR, Inc., B-203391.4, Apr. 1, 1982, 82-1 C.P.D. ¶ 292.

In this case, the concept of responsiveness does not apply since negotiation rather than formal advertising procedures were used; the question really is whether American's proposal, as submitted, properly could be viewed as acceptable. Los Angeles Community College District, B-207096.2, Aug. 8, 1983, 83-2 C.P.D. ¶ 175. We think that it could.

Unlike the situation in B-164885, supra, the challenged offeror here did not take exception in its proposal to the current model requirement. As the Air Force states, commercial manuals representative of the offeror's product could be submitted with the proposal. American submitted a manual, annotated to show required changes. The Air Force reports that "[n]ormally, machine tool builders have a basic machine which is modified" to reflect a customer's ordering data, and implicitly indicates that the changes indicated by American were minor. Nothing presented by the protester or that otherwise is in the record suggests that the changes were not minor. In this regard, we think a fair reading of the specification requirement is that a manufacturer's

current model is to be modified, if necessary, to conform to the specified accuracy requirements. 2/ The protester's position, which seems to be that the specification provision requiring a current model precludes any modification to an existing model, simply is inapposite here.

Since American's proposal was not unacceptable as submitted, and since the Air Force, as part of its responsibility determination, found that American could and would meet all specification requirements, we have no basis to object to the award on the basis of this first issue raised by Clausing.

Improper Award Procedures

Clausing alleges that the Air Force improperly facilitated an award to American. Specifically, Clausing argues that both the length of the evaluation period and amendment No. 0002, that eliminated a certain requirement for measuring devices in a specific system, favored American since that company was building a new machine. Furthermore, Clausing alleges that the Air Force ignored the fact that American was not an established source of the machine and had no prior experience, and that its costs were unrealistic. Also, Clausing alleges that American was improperly given a preference for being a small business.

Clausing further contends that the Air Force acted improperly by conducting an engineering review and preaward survey on American prior to the solicitation of best and final offers. Clausing asserts that performing the survey before any of the other offerors submitted best and final offers constituted an improper discussion.

The Air Force denies that it did anything improper, and states that the evaluation period was not unusually long considering the number of offers received (16) and the number of destinations involved for purposes of determining transportation costs. The Air Force advises that the amendment was issued to correct an ambiguity in the RFP, and eliminated a requirement that unnecessarily restricted competition. Also, the Air Force reports that the only discussions held with offerors, including Clausing, were to obtain prices for option and data items and that American was contacted only for the purpose of clarifying its proposal. The

2/ See Schreck Industries, Inc., supra, for a case where the specifications required a "standard design item" but even more clearly permitted modifications to a manufacturer's "standard design."

Air Force advises that it did not consider these contacts to be discussions at the time and therefore had a preaward survey conducted on American. Later, the Air Force decided that the earlier contact with the offerors could be considered negotiations. Therefore, it requested best and final offers from offerors to provide them the opportunity to revise their offers. The final award was made to American because it remained the low offeror.

From our examination of the record, we see nothing unreasonable in the way the Air Force conducted this procurement and find no evidence that suggests that the Air Force improperly facilitated an award to American.

Regarding the length of time of the evaluation, the RFP was issued on February 8, 1984, with an amended closing date of April 16, 1984. The closing date for best and final offers was July 17; award was made to American on July 24. We do not view a period of 3-1/2 months from the submission of initial proposals to award to be unnecessarily long considering that discussions were held and that transportation and Buy American Act evaluations had to be made as part of the overall evaluation.

Amendment No. 0002, as noted by the Air Force, resolved an ambiguity caused by a conflict between two specification sections and removed the requirement for an "inch/metric gearbox" and substituted an "inch gearbox." This amendment had no effect on American's offer as its lathe met the inch/metric gearbox requirement, which certain other offerors did not possess. Finally, the fact that the preaward survey was conducted before best and finals were requested is not objectionable because, at the time of the preaward, the Air Force had not decided to request another round of offers. We fail to see how Clausing was prejudiced by the Air Force's giving offerors the opportunity to revise their proposals once it determined that the prior clarifications were actually discussions.

Clausing alleges that the Air Force ignored factors such as experience and cost realism in making the award. Experience is a factor relating to the responsibility of the offeror, which the contracting officer must take into account before making an award. As indicated earlier, an affirmative determination of American's responsibility was made before the award. Our Office does not review such a determination absent a showing of possible fraud on the part of procuring officials or an allegation that the solicitation contained definitive responsibility criteria that were

not applied. Janke and Co., Inc., B-216055, Aug. 22, 1984, 84-2 C.P.D. ¶ 218. Neither exception applies here.

Since this solicitation resulted in a fixed-price contract, not a cost-type contract, there was no requirement for a cost realism study. Actually, Clausing is contending that American cannot furnish the lathes at the price it offered. There is, however, no legal basis to object to an award on the basis of a below-cost offer. Whether an offeror can meet the contract requirements at its offered price is a matter of responsibility. Gyro Systems Co., B-216447, Sept. 27, 1984, 84-2 C.P.D. ¶ 364. As noted above, American was found to be a responsible offeror.

Buy American Act

Clausing alleges that the Air Force acted improperly by assisting American in changing its Walsh-Healey Act certification from regular dealer to manufacturer. Clausing contends that permitting American to change its certification allowed the Air Force to evaluate American's proposal without having to apply the Buy American Act's evaluation factors. In this connection, Clausing states that American's lathes are manufactured in Taiwan and that American is a dealer, not the manufacturer; furthermore, the contracting officer admits that the castings, gears, and electronics in American's lathes are imported from Taiwan. Clausing contends that there is no reasonable basis upon which the contracting officer could have excluded American's proposal from the Buy American Act requirements because the above parts represent 95 percent of the cost of the lathe.

The Air Force reports that American certified that it is a small disadvantaged business concern and a regular dealer, and that 50 percent of the item would be of foreign content. The Air Force advises that clarification of the foreign content was necessary to determine whether it should apply the Buy American factor to the offer. In response to its inquiry to American, the Air Force states, American indicated that in fact it is the manufacturer, rather than a dealer, and that 50 percent of the manufacturing effort would be performed in the United States. Subsequently, the Air Force verified in the preaward survey that more than 50 percent of the cost of the components would be incurred in the United States.

The Buy American Act establishes a preference for domestic products over foreign products through the use of an evaluation differential that is added to the price of the foreign product. The Act defines a domestic end product as an unmanufactured end product mined or produced in the

United States or an end product manufactured in the United States if the cost of its qualifying country components and its components which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components.

We think the Air Force properly determined that American would furnish a domestic product. First, the fact that American initially certified itself as a dealer is not determinative of its actual status, since an offeror may establish that it is a regular dealer or manufacturer up to the time of award. Federal Acquisition Regulation, 48 C.F.R. § 22.606 (1984). Second, the brochure submitted by American with its offer suggests that American is a manufacturer: it lists American's plant's address and contains a space for a distributor's name and address. If American were only a dealer, it would not have distributors but would be the distributor itself. Finally, the preaward survey shows that the cost of the foreign components does not exceed 50 percent of the cost of all the components. The foreign components of the lathe, as verified by the preaward survey, include the lathe bed, spindle, splines and gears, head stock, base, crosslide, lead screws, feed rods, compound and tailstock and variable speed drive. These components total less than 50 percent of the price of the lathe. The other 24 items on the parts list are of United States manufacture and exceed more than 50 percent of the offered price. Therefore, we conclude that the Air Force properly excluded American from evaluation under the Buy American Act.

To the extent that Clausing is now challenging the status of American as a manufacturer, this Office does not consider the legal status of a firm as a regular dealer or a manufacturer within the meaning of the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1982). By law, this matter is to be determined by the contracting agency, in the first instance, subject to review by the Small Business Administration (where a small business is involved) and the Secretary of Labor. Semco, Inc., B-216474, Oct. 9, 1984, 84-2 C.P.D. ¶ 395.

Improper Cancellation

Clausing complains about a prior lathe procurement, under which it contends it received an award that was subsequently canceled, to show the controversy surrounding the procurement history of this item. This is irrelevant to this protest. Each procurement action is a separate transaction, however, and the action taken on one procurement does not govern the conduct of similar procurements.

Channel Disposal Co., Inc., B-215486, Aug. 17, 1984, 84-2 C.P.D. ¶ 191. Moreover, a complaint about this cancellation, involving a September 1982 procurement, is untimely because it was filed more than 10 working days after the basis of protest should have been known. 4 C.F.R. § 21.2(b)(2) (1984).

Responsibility

Finally, Clausing contends that American is not a responsible contractor because it lacks adequate financial resources. Clausing argues that it will not be able to comply with the delivery schedule because it does not have a satisfactory record of performance and lacks the experience. As previously indicated, we will not review the contracting officer's affirmative responsibility determination in the circumstances presented by this case.

The protest is denied.

Harry R. Van Cleve
General Counsel