



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ramal Industries, Inc.
File: B-224375
Date: October 6, 1986

DIGEST

1. A protest against the failure to submit complete cost and pricing data, when adequate price competition was obtained and the data was not used, is academic, since such data is not required in that situation.
2. Allegations concerning the completeness of a contractor's small business subcontracting plan and the certificate of the lack of pending suspension or debarment proceedings against the contractor, its affiliates and employees constitute protests of an affirmative determination of responsibility, which our Office will not review in the absence of a showing of possible fraud or bad faith on the part of contracting officials or a failure to apply definitive criteria of responsibility.
3. Where the solicitation calls for bidding in quantity ranges; allows for awards of any quantity less than the quantity inserted absent a clear contrary indication by the offeror; and permits the selection of any combination of multiple awards, an offeror's insertion of the maximum quantity for each range does not constitute a limitation on its offer to that quantity only, but represents an offer to furnish any quantity within the range at the entered unit price.
4. Protest that agency improperly conducted discussions with two other offerors is denied where record shows that no discussions were held.
5. A protest filed at the General Accounting Office more than 10 working days after the basis of protest is known is untimely.
6. Fact that mobilization base firms' Department of Defense Industrial Preparedness Program Production Planning Schedules

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(DD Form 1519). expired before procurement does not render firms ineligibile for awards under solicitation restricted to mobilization base producers, since designation as such does not depend on the form and the firms were still so designated.

DECISION

Ramal Industries, Inc., protests the award of contracts to Revere Copper and Brass, Inc., and Clover Industries under request for proposals (RFP) No. DAAA09-85-R-0681, issued on September 30, 1985, by the United States Army Armament, Munitions and Chemical Command, Rock Island, Illinois, for copper cones for 155 MM projectiles. The RFP was restricted to offerors that were mobilization base producers, pursuant to the Army's authority to use other than competitive procedures when it is necessary to award the contract to a particular source or sources of supply in order to maintain facilities available to furnish the items for industrial mobilization purposes. See 10 U.S.C. § 2304(c)(3) (Supp. III 1985); Federal Acquisition Regulation (FAR), 48 C.F.R. § 6.302-3 (1985).

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

Protest

The RFP was issued to four mobilization base producers, including Ramal. It provided for the acquisition of 109,309,801 copper cones in five quantity ranges; offers could be made on any combination of ranges. The Army reserved the right to select any combination of multiple awards determined to be in the best interest of the government, price and other factors such as mobilization base considerations, contractor capacity and potential additional requirements, considered. All four mobilization base producers submitted offers. On April 30, 1986, the Army awarded a contract to Clover for 18,863,800 units for \$1,763,010.75, and a contract to Revere for 90,446,001 units for \$8,584,591.74.

Ramal protested to our Office on June 23, contending that Clover and Revere failed to comply with certain material requirements of the RFP: the submission of cost and pricing data, the submission of a complete subcontracting plan by Revere, the certification as to the lack of pending suspension or debarment proceedings by Revere, and range bidding. Ramal also alleged that the Army held discussions with the awardees and not with Ramal. Ramal further argued that under

mobilization base policy and instructions, award only to Clover and Revere is not in the government's interest, since the result will be to put Ramal out of business; the protester asserts that with the government buying so many cones it could award more than the two contracts and thus maintain more than two mobilization base firms. Ramal supplemented its protest on July 22, after receiving the Army's response on July 9 to its June 24 Freedom of Information Act (FOIA) request, to include the allegation that, at the time of proposal submission and award, the Industrial Preparedness Agreements of Clover and Revere had expired, so that neither should have been considered eligible for award.

Discussion

(1) Ramal first complains that Revere and Clover did not submit adequate cost and pricing data. In fact, both awardees did submit Standard Form 1412 containing cost and pricing data. However, since adequate price competition was obtained, a cost analysis was not required and the cost and pricing data was not used. Therefore, Ramal's objection to Revere's and Clover's submissions of cost and pricing data is academic. See Intermountain Research, B-209827, July 21, 1983, 83-2 C.P.D. ¶ 103.

(2) Ramal contends that the small business subcontracting plan Revere submitted was inadequate. (Clover did not have to submit such a plan because it is a small business.) However, the adequacy of a small business subcontracting plan relates to the agency's affirmative determination of responsibility. Devcon Systems Corp., 59 Comp. Gen. 614 (1980), 80-2 C.P.D. ¶ 46. Our Office will not review such a determination in the absence of a showing of possible fraud or bad faith on the part of contracting officials or that the solicitation contained definitive responsibility criteria that allegedly were not applied. Moore Service, Inc., B-212054, Dec. 6, 1983, 83-2 C.P.D. ¶ 648. Neither exception applies here.

(3) Ramal protests Revere's failure to complete the certification in the RFP as to the lack of pending suspension or debarment proceedings. The Army responds that it independently affirmed before award that Revere was neither debarred nor suspended from receiving government contracts; that on June 17, after award, Revere confirmed that, at the time of signing its proposal, it did not know of any pending suspension or debarment proceedings against it, its affiliates or employees; and that Revere also confirmed that neither it nor its affiliates or employees had been suspended or debarred.

As is the case regarding the subcontracting plan, Ramal's complaint constitutes a protest against the Army's determination that Revere is a responsible contractor. Ramal has neither alleged nor shown that either of the exceptions that warrant our review applies and, accordingly, we dismiss the protest as to this issue.

(4) Ramal asserts that neither Revere nor Clover complied with the solicitation's requirement for range bidding. The RFP provided for offers on five quantity ranges in increasing amounts from 15,000,001 to 109,309,801 (e.g., Range A: 15,000,001 to 33,682,000; Range B: 33,682,001 to 52,723,000). Firms could submit offers in any combination of ranges. Revere inserted a single unit price for each range and extended it by the maximum quantity for that range to calculate the entry it inserted in the schedule's "amount" column. Clover wrote in the quantity column the maximum quantity for each of the first three ranges, a quantity less than the maximum for the fourth, and "NO BID" for the fifth; each of the first four was extended for the "amount" column accordingly. Clover's contract is for a number of cones within Range A; Revere's contract is for the minimum quantity in Range E. Ramal alleges that each extension by the maximum quantity for the "amount" column constituted an improper limitation of the offer to that quantity.

We find no merit to this aspect of Ramal's protest.

The RFP permitted the Army to select any combination of multiple awards determined to be in the best interest of the government, and gave the Army the option of awarding less than the quantity offered at the unit price offered, unless the offeror specified otherwise. We think the only reasonable reading of the awardees' offers in the context of the solicitation as a whole is that Revere and Clover were offering any quantity within the range in issue for the noted unit price, up to the quantity on which the extended price was based. Thus, Revere was offering any quantity within each range for the entered unit price; Clover was offering any quantity within the first three ranges for the entered unit price, but would not take a contract for more than the quantity entered in Range D. We think Ramal's suggestion that each was offering only a specific number of cones at the entered unit price is, in the context of this procurement, untenable. Accordingly, we deny the protest as to this issue.

(5) Ramal alleges that the Army must have held discussions with Revere and Clover regarding the delivery schedule, and therefore should have held discussions with Ramal.

The RFP called for delivery of the copper cones to begin July 31, 1986. Included in the RFP was an Executive Summary, which was "provided solely as an administrative convenience," and which briefly described the purchase. The Summary stated that the delivery schedule was predicated on award by February 28, and would be extended on a day-to-day basis for each day beyond the date that the contract actually was awarded. The contracts were awarded on April 30, with delivery to begin July 31. Ramal argues that the Army must have negotiated with Revere and Clover since the delivery schedule was not extended past July 31, even though award was made 2 months late. The Army responds that no discussions took place with any offerors.

The record supports the Army's assertion that it did not negotiate with any of the offerors. We will not conclude that improper discussions were conducted simply because the Army did not award based on the Executive Summary provision for an extended delivery schedule, but instead awarded, without objection from the selected offerors, on the basis of the more advantageous delivery schedule included in the RFP itself. We therefore deny the protest on this issue.

(6) Ramal contends that it is incumbent on the Army to maintain the manufacturing facilities of all mobilization base companies, and complains that if Ramal does not receive an award under this contract, it will go out of business.

The Army responds that Ramal's contention is untimely, since Ramal should have protested the issue within 10 days of the contract awards. In this respect, our Bid Protest Regulations require that protests be filed within 10 working days of when the protester knew or should have known of the basis for protest. 4 C.F.R. § 21.2(a)(2) (1986). Ramal, however, argues that it actually is protesting the Army's interpretation of its mobilization base policy as articulated in the Fiscal Year 1986 Class Justification and Approval for Other than Full and Open Competition (FY 86 J&A) restricting this solicitation, among others, to the four mobilization base offerors; that document sets forth the goals to be accomplished by use of other than full and open competition, one of which is to "divide respective production requirements among two or more contractors to provide for an adequate mobilization base" Ramal asserts it did not even receive a copy of the document until July 9, when it received a response to its June 24 FOIA request. (Ramal states that it based its June 23 protest of this issue on the FY 85 J&A, of which it had a copy.)

We agree with the Army that Ramal's protest on this issue is untimely. The solicitation provided for multiple awards depending on mobilization base considerations, among other things, and we think it was incumbent on Ramal to argue that the Army should maintain the firm as another mobilization base contractor as soon as Ramal knew that the Army was not going to do so. While the FY 86 J&A may have given Ramal what it believed to be support for its position, in our view Ramal's basis for protest clearly arose when it learned of the awards.

In any event, decisions about how many firms must be kept in active production as mobilization base producers necessarily involve a great deal of discretion by the military agencies. We therefore will not question the agencies' decisions absent a convincing showing that they abused their discretion. Martin Electronics, Inc., 65 Comp. Gen. 59 (1985), 85-2 C.P.D. ¶ 504. Neither the RFP nor the FY 86 J&A require award to all possible mobilization base producers listed for a particular procurement. Although Ramal disputes the Army's determination that award to only two of the four producers is consistent with mobilization base needs, Ramal simply has not shown that the Army abused its discretion in this procurement.

(7) Ramal argues that since Revere's and Clover's Industrial Preparedness Agreements, DD Form 1519, had expired at the time of proposal submission, the firms should not have been considered for award. (Ramal's agreement expired September 30, 1986.) In this respect, the Executive Summary of the RFP provided that the procurement was restricted to the four specified mobilization base producers, and stated that only proposals from current mobilization base producers of the cones would be considered for award. In addition, the FY 86 J&A applicable to this procurement limits competition for this item to planned producers with whom Industrial Preparedness Agreements exist.

Mobilization base producers are participants in the Department of Defense (DOD) Industrial Preparedness Production Planning Program. See DOD FAR Supplement, 48 C.F.R. § 208.070 (1985). This program allows DOD to plan to assure the capability for the sustained production of essential military items in order to meet the needs of United States and Allied Forces during an emergency. The planning with possible producers is accomplished via completion of the DD Form 1519, which is not binding on either the contractor or the government; it merely details the capability of a producer to produce the desired item in a certain time frame so as to enable the Army to plan for its mobilization needs

accordingly. See Vermont Division of Dynamics Corp. of America, B-186154, Aug. 31, 1976, 76-2 C.P.D. ¶ 207.

The Army acknowledges that Revere's and Clover's agreements expired September 30, 1985. (The closing date for receipt of proposals was February 5, 1986.) The Army notes, however, that due to an ongoing study of industrial planning procedures there has been a moratorium on the renewal of old and the initiation of new agreements with contractors considered by the Army to form the mobilization base. The Army therefore amended the FY 86 J&A as of August 5, 1986, to continue to designate the producers named in that document as the Army's mobilization base producers for the items listed. In addition, the Army points out that the agreements are not binding on either party and are only planning schedules executed to enable the Army to plan for its mobilization needs.

We do not agree with Ramal that the expiration of the agreements in question rendered Revere or Clover ineligible for this procurement. As stated above, the agreement only indicates the willingness of a firm to produce the desired items and is not binding on either party; clearly, the responses of Revere and Clover to the restricted RFP indicated the same willingness reflected in a DD Form 1519. Further, Revere and Clover did complete, and the Army did approve, the agreements for inclusion on the list of mobilization base producers for the FY 86 J&A, executed on July 24, 1985. Finally, even if DOD policy were to require a current DD Form 1519 as a prerequisite for award, we view compliance with that policy as an internal matter for resolution within DOD rather than through the bid protest process. See True Machine Co., B-215885, Jan. 4, 1985, 85-1 C.P.D. ¶ 18. In this respect, it is clear that the Army did not consider it relevant that the agreements in issue had expired, since the expiration was occasioned only by the Army's own internal moratorium on renewal, and the same FY 86 J&A that limited the competition to planned producers with existing agreements specifically designated Revere and Clover as potential contractors for the cones. In these circumstances, expiration of the firms' previously-executed agreements did not in itself render the firms ineligible for award under the RFP.

The protest is dismissed in part and denied in part.

for 
Harry R. Van Cleve
General Counsel