The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gerber Scientific Instrument Company

File: B-225383

Date: January 6, 1987

DIGEST

1. Allegation that a liquidated damages clause should not have been included in request for proposals is untimely and will not be considered where protest was filed after the closing date for receipt of initial proposals.

2. Mandatory liquidated damages requirement under request for proposals may not be considered to have been waived or relaxed by agency request for best and final offers from offeror which took exception to the requirement in its initial offer. A determination to relax or waive such a requirement would have to be made by amendment to the solicitation.

3. Buy American Act does not prohibit purchases of foreign-made products but requires application of differential to foreign offer for price evaluation purposes. Where foreign offeror is only technically acceptable offeror, whether differential is applied is irrelevant.

DECISION

Gerber Scientific Instrument Company (Gerber) protests the award of a contract for a flatbed plotter and related support services to Kongsberg, Inc., under request for proposals (RFP) No. YA551-RFP6-440013, issued by the Department of the Interior. Gerber asserts that its offer was improperly rejected, that the technical evaluation was not conducted in accordance with the RFP evaluation criteria, and that the Buy American Act was violated by award to Kongsberg.

We deny the protest.

The crux of Gerber's protest concerns its exception to one of the liquidated damages provisions contained in the RFP. Section C.10.6 of the RFP provides that if the contractor's

maintenance personnel fail to arrive at designated locations within specified response times (specified elsewhere as 8, 10, or 48 hours depending on plotter location and time of request for service), after notice that remedial maintenance is required, the government shall receive a credit. Section F.8 is referenced for calculation of the credit, and provides that creditable hours shall be accumulated monthly, adjusted to the nearest hour, and computed at a rate of $100 per hour, not to exceed the total monthly charge in any month. Section L.1.2.1 of the RFP provides that: "In order to have an acceptable proposal, the offeror must meet all of the mandatory specification requirements set forth in Section C."

In its initial proposal, which was due July 18, 1986, Gerber took exception to this liquidated damages provision, stating: "Since creditable hours for failure to arrive within the response time are not provided for our commercial customers, GSI feels that this clause should be deleted and is not accepted." After benchmark testing, by letter of September 12, Interior called for best and final offers by a September 22 closing date. By telegram dated September 24, Interior amended certain of the specifications, not including the liquidated damages clause at issue, and called for a second round of best and final offers due by September 29. At a meeting on September 25, a memorandum of which appears in the contracting officer's file, the contracting officer advised Gerber personnel that the liquidated damages provision in issue was considered a critical element for mission accomplishment, and that if Gerber took exception to the clause in its amended best and final offer, Interior would consider the proposal "nonresponsive." In its second best and final offer, Gerber again took exception to the liquidated damages clause. After receiving notification from Interior on October 6 that award had been made to Kongsberg, Gerber filed its protest in our Office on October 16.

To the extent that Gerber is protesting the reasonableness of the liquidated damages requirement in the solicitation, the protest is untimely. Gerber first protested to our Office after the date for the submission of initial offers. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), protests based on alleged solicitation deficiencies apparent from the face of the solicitation must be filed prior to the closing date for submission of initial proposals. Allegations such as Gerber's, which are based on objectionable solicitation provisions, involve such apparent solicitation deficiencies and thus must be raised before the initial closing date. Tracor Applied Sciences, B-219735, Sept. 26, 1985, 85-2 C.P.D. ¶ 343. In this regard, taking exception to a solicitation requirement in a proposal does not satisfy the

preclosing filing rule. Trident Motors Inc., B-213458, Feb. 2, 1984, 84-1 C.P.D. ¶ 142. Consequently, since Gerber believed the liquidated damages clause was improper, it was required to protest this prior to the July 18, initial closing date. Since Gerber failed to do so, its protest on this point is untimely.

Gerber's other allegation in this regard, that Interior, by its conduct, relaxed the liquidated damages requirement, is without foundation. Gerber's argument is essentially that once it took exception to the requirement in its initial offer, by requesting a best and final offer, without specifically pointing out this exception as a deficiency, Interior, by implication, waived or relaxed the requirement. However, during negotiations with Gerber on August 28, the contracting officer specifically advised Gerber that the liquidated damages clause would not be relaxed by the government. In addition, at the September 25 meeting between Gerber and the contracting officer, prior to the submission of the second best and final offer, the contracting officer explicitly advised Gerber's representatives that continued exception to the clause in question would result in Gerber's proposal being found "nonresponsive," that is, technically unacceptable. Gerber does not deny this. It argues that since this information does not appear in any amendment to the solicitation, or in the agency request for best and final offers, it is not supported by the record. In our view, Gerber's position is unfounded since the agency file contains substantiating memoranda by the contracting officer, and the protester does not deny the substance of the memoranda.

Moreover, the contracting officer could not have waived or relaxed the mandatory specification requirement for Gerber by implication of his course of conduct of the discussions. Under the Federal Acquisition Regulation, 48 C.F.R. § 15.606(a) (1985), when either before or after receipt of proposals an agency changes, relaxes or otherwise modifies its requirements, the solicitation must be amended to reflect the modification. This insures that competition is conducted on an equal basis, which requires that offerors be provided a common basis for submission of proposals, a fundamental principle of competitive procurement. AT&T Communications, B-221463, B-221464, Mar. 12, 1986, 65 Comp. Gen. ____, 86-1 C.P.D. ¶ 247. Accordingly, Gerber's argument that it could presume that the requirement had been waived or relaxed is without merit.

Since Gerber's proposal properly was determined to be technically unacceptable because of the liquidated damages clause, we need not address the issue raised regarding the accuracy of its plotter.

Finally, regarding the allegation that award to Kongsberg, which is offering an end product of Norway, violates the Buy American Act, Gerber seems to argue that purchases of foreign-made goods are prohibited. The Buy American Act does not prohibit such purchases, but only requires that a differential be applied to the offer for evaluation purposes. Bartlett Technologies Corp., B-218786, Aug. 20, 1985, 85-2 C.P.D. ¶ 198. Since Kongsberg is the only remaining offeror, whether the differential is applied to its bid for evaluation purposes, is irrelevant.

We deny the protest.

for Raymond Efros
Harry R. Van Cleve
General Counsel