



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of:           Para Scientific Company  
File:                 B-225302  
Date:                March 25, 1987

### DIGEST

1. Protest that solicitation clause--requiring offerors for multiyear, multiple-award Federal Supply Service contracts to demonstrate that their anticipated total sales under the contract are at least \$25,000--is ambiguous is untimely when submitted after the closing date for receipt of proposals.
2. Agency properly rejected offer for Federal Supply Schedule contract where record does not demonstrate that offeror met minimum sales requirement set forth in solicitation, and agency's determination based upon sales records supplied by offeror was reasonably based.

### DECISION

Para Scientific Company protests the rejection of its offer submitted in response to solicitation No. M5-Q52-87 issued by the Veterans Administration (VA) to obtain multiyear, multiple-award Federal Supply Service (FSS) contracts to supply in vitro diagnostic substances, reagents and test sets for the period from January 1, 1987 through December 31, 1989. The VA states that the offer was rejected because Para's anticipated sales to the government were not expected to meet the anticipated sales requirements specified for the new contract.

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

The General Services Administration (GSA) normally is responsible for FSS procurements but it has delegated to the VA authority for the procurement of items that come within FSS Group 65, Part VII, which includes the items which are the subject of this procurement. GSA has determined that it is economically feasible to retain a company on a

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multiple-award schedule contract only if its past sales experience indicates sufficient demand for that company's products to warrant the expense of negotiating and administering a contract with it. Venusa, Ltd., B-214538, July 30, 1984, 84-2 CPD ¶ 124. In previous contracts the threshold for retention was \$10,000 in anticipated sales over the term of the contract. By letter of February 27, 1986, however, GSA issued a change to its FSS Clause Manual, effective on the same date, increasing the threshold for retaining a contractor to anticipated sales of \$25,000. Accordingly, the following clauses were included in the present solicitation:

"I-FSS-639 INSUFFICIENT SALES (APR 84):

Where previous reports of orders received under an item for a manufacturer's equipment indicate insufficient volume to warrant its continuance, the government may discontinue its inclusion in the schedule."

"I-FSS-639-A CONTRACT AWARD SALES CRITERIA (JAN 86):

Normally a contract will not be awarded unless anticipated sales are expected to exceed \$25,000.

It is the policy of the Government not to contract for a product when the anticipated purchases of the item will be less than \$2,000 for a one year period. Contractors should not offer products which do not meet this criteria."

Para's offer was among the 138 offers received by the VA and it indicated that Para's sales under a previous contract which covered 1,062 items were only \$11,083 for calendar year 1985. The contracting officer concluded that based upon the low sales the offer did not warrant further consideration. The contracting officer also stated, "With a total of 1,062 items I seriously doubt any individual item reached [the \$2,000] threshold." Accordingly, Para's offer was rejected for failure to meet the sales retention thresholds.

Para protested to the VA contending that clause I-FSS-639A does not require previous sales of \$25,000 per year but only that anticipated sales for the term of the contract be \$25,000 and that its total sales to all customers exceeded

\$25,000. Para also stated that it had not been told that the sales retention threshold had been changed from \$10,000 to \$25,000 for the procurement.

The VA denied the protest by letter of November 17, 1986, stating that only sales to the government could be considered when determining whether a company meets the retention threshold. The VA also reexamined the prior sales to the government reported by Para in calendar years 1983, 1985, and for the first two quarters of 1986. In this 2-1/2-year period, Para's sales under the contract totaled \$19,952. The VA extrapolated from this figure and calculated that Para's sales to the government over a 3-year period would be approximately \$23,940. Thus, the VA concluded that Para's offer was properly rejected because its total sales to the government for the 3-year contract period were not expected to exceed the \$25,000 sales threshold.

To the extent that Para contends that the \$25,000 threshold requirement in the solicitation was ambiguous, the protest is untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals be filed prior to that date. The closing date for receipt of proposals here was September 12, 1986, and the record contains no indication that Para submitted a protest objecting to any provision in the solicitation to either the VA or our Office prior to that date. With regard to Para's statement that it was not told of the threshold increase, we point out that the solicitation clearly stated that the anticipated total sales threshold was \$25,000.

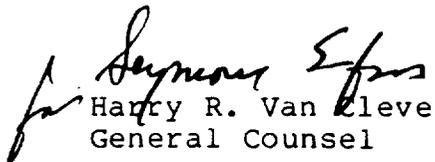
Para concedes that it cannot demonstrate that its anticipated sales for each individual item offered are \$2,000 per year. Indeed, Para challenges the VA to show that any of its proposed awardees who are distributors "or the majority of those awardees in the past" have met this requirement. Para requests that we undertake an investigation to determine if the old and the proposed awardees have complied with the requirement. In this regard, we point out that it is the protester that has the burden of affirmatively proving its case and that our Office will not conduct an investigation to establish whether the protester's speculations are valid. Alan Scott Industries, B-223121.3 et al., Aug. 6, 1986, 86-2 CPD ¶ 163.

In our opinion, the VA reasonably rejected Para's offer as not meeting the \$25,000 prior sales requirement. While there is some confusion in the record as to whether the threshold

for sales to the government was to be based upon a 1-year period or the entire 3-year period of the present contract, the record shows that the VA ultimately gave Para the benefit of allowing the less stringent 3-year period. The VA used figures supplied by Para for contract sales for a total of 2-1/2 years and projected that Para's sales for a 3-year period would be only \$23,940, or below the threshold. Thus, it appears that the VA was quite liberal in interpreting both the solicitation clause and prior sales records in Para's favor, and even then Para did not qualify based upon the minimum anticipated required sales to the government.

Finally, Para contends that clause I-FSS-639-A does not require that an offeror meet both the anticipated sales minimums. We do not agree. There is nothing in the wording of this clause reflecting an intent that the offeror needs to comply with only one of the minimum sale requirements. Such an interpretation would be unreasonable as it would conflict with the VA's purpose in imposing the requirement which is to reduce its contract acquisition and administration expenses. In any event, as the VA found that Para's anticipated sales did not meet the minimum for total sales and Para has conceded that its anticipated sales for each item offered do not meet that minimum, Para has met neither requirement. Accordingly, we conclude that the VA acted reasonably in rejecting Para's offer.

The protest is dismissed in part and denied in part.

  
Harry R. Van Cleve  
General Counsel