



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Keyes Fibre Company

File: B-225509

Date: April 7, 1987

DIGEST

1. Allegation that awardee's "bid" was "nonresponsive" to solicitation specifications is without merit not only because procurement was conducted by negotiation and not through sealed bidding, but because in its offer awardee took no exception to solicitation requirements. Protest is directed more to the responsibility of the offeror than to the "responsiveness" or technical acceptability of its offer. -

2. The submission of a below-cost offer on a firm-fixed-price contract is legally unobjectionable. Protester's arguments that awardee's low price calls in question its ability to perform satisfactorily, i.e., the firm's responsibility, or suggests it made a mistake are dismissed since General Accounting Office generally does not review contracting officers' affirmative determinations of responsibility and because a competitor does not have standing to claim an error in another's offer.

3. Contention that contracting officer either abdicated her duty to make an affirmative determination of awardee's responsibility or did so in bad faith is denied where, before award, contracting officer was in possession of positive preaward surveys of awardee's financial capability and production facilities.

4. Contention that all offerors were not competing on an equal basis with regard to the delivery schedule is denied where modification to awardee's contract which extended delivery on certain purchase orders by 3-4 weeks in exchange for a reduction in contract price occurred approximately 3 months after award. In absence of any indication that agency solicited offers on the basis of one delivery schedule with the intent of extending it upon award, the modification here made to the awardee's contract is a matter of contract administration which General Accounting Office will not review.

5. Fact that at time of preaward survey one of the awardee's production facilities lacked two items of equipment needed to test disposable paper plates to standards set forth in solicitation's Commercial Item Description does not establish that agency waived the solicitation's "commercial item" requirement. Whether awardee, an established commercial producer of such items, would comply with RFP's commercial item certification is a matter of that firm's responsibility and in any event record shows that one of awardee's plants had a full complement of testing equipment and required testing equipment was on order for other plant.

DECISION

Keyes Fibre Company protests the award of a contract to the Fonda Group, Inc., by the General Services Administration (GSA) under solicitation No. 9FCO-OKH-N-A1265/86, for a quantity of heavy-duty paper plates. The protester has raised a number of grounds for protest in its initial submission and in its comments on the agency report: that the awardee's offer and the product itself did not and cannot conform to the solicitation's commercial item description; that the awardee submitted a below-cost offer; that the agency failed to make an affirmative finding of responsibility with regard to the awardee or, in the alternative, that such a finding was made in bad faith; and that the agency improperly waived certain requirements and modified the delivery schedule after award of the contract.

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

On March 12, 1986, GSA issued the solicitation requesting proposals for some 35 separate line items representing varying quantities of eight different paper plates and trays. The solicitation contemplated a 1-year, firm-fixed-price, requirements contract, or contracts, for these items. At issue in this protest is line item 25,^{1/} a heavy duty, extra water- and grease-resistant, disposable, round,

^{1/} The initial protest also encompassed line item 26, the same product to be shipped to a different depot. Since prior to award GSA determined that there no longer was a need for line item 26 and made no award of it, we dismiss as academic Keyes' protest concerning it. See Michael A. Colonna, B-222325, May 22, 1986, 86-1 C.P.D. ¶ 480.

10-1/4 inch diameter, three-compartment paper plate for use by food service activities. The record indicates that the protester manufactures these plates by molding them from paper pulp whereas Fonda die-cuts discs from a laminated and coated paperboard roll and forms the plate in a machine by the application of heat and pressure.

Plates supplied under item 25 were to be in accordance with Commercial Item Description (CID) A-A-1504, dated June 24, 1982. The two-page CID does not dictate any particular method of manufacture; therefore, either molded or pressed plates would be acceptable so long as they conform to certain dimensions and meet certain standards for rigidity, water and grease resistance, transmission of objectionable tastes or odors, and workmanship. Competition was limited to price; no technical proposals or samples were required to be submitted with the offers.

In its initial submission to our Office, Keyes stated that the award to Fonda presented "two grounds" for protest: (1) that the "plates" manufactured by Fonda were "completely nonresponsive" to the specifications and (2) that GSA had made no effort to "inspect the Fonda plates" prior to award and "otherwise investigate the price disparity between the Fonda and Keyes bids." Based on its knowledge of the plate -- Fonda has the capability to manufacture, Keyes argued, Fonda "could not and did not" respond to the CID nor, "possibly," to the special requirements for waterproof packing of the cases of paper plates. The protester asserted that from both "technical and pricing" standpoints, Fonda could not adhere to the CID, because the Fonda "plate" is "nonresponsive" to the rigidity requirements of the CID and because Fonda's price was so unreasonably low "as to suggest that its bid is mistaken and/or nonresponsive."

Keye's arguments about the "responsiveness" of Fonda's offer are couched in language appropriate to a sealed bid procurement. Even then, Keye's argument would be somewhat off the mark, since its position is that Fonda's "plate" is nonresponsive to the solicitation specifications, whereas it is the bid--and not the product (absent a bid sample requirement)--by which responsiveness is measured. Moreover, it is clear from the face of the solicitation that this is a negotiated, and not a sealed bid, procurement.

As GSA points out, the concept of responsiveness is inapplicable to a negotiated procurement. According to the agency, the protester actually is questioning Fonda's responsibility rather than the responsiveness of its offer.

We agree. As a general rule, the concept of responsiveness does not apply to negotiated procurements. True Machine Co., B-215885, Jan. 4, 1985, 85-1 C.P.D. ¶ 18. We have held that, within the context of a negotiated procurement, certain solicitation requirements may be sufficiently material so that an offer which fails to include them is technically unacceptable. Id. In its offer, however, Fonda took no exception to the specification requirements; in fact, under the terms of the RFP's "Commercial Item Certification" clause, by signing its offer, Fonda certified "that the product(s) offered meet the requirements of the CID" Even measured by the standards applicable to a sealed bid procurement, Fonda's offer was "responsive" in that it represented an unequivocal offer to provide the supplies described in the solicitation. See Hicklin GM Power Co., B-222538, Aug. 5, 1986, 86-2 C.P.D. ¶ 153 at 4. Keyes' protest of the "responsiveness" of Fonda's offer is denied.

The second ground of protest initially asserted by Keyes is that Fonda's price was so low as to call into question its ability to deliver a product which will conform to the specifications, including the required waterproof packaging, or which suggests that Fonda made a mistake in calculating its price.

As for Keyes' speculation that Fonda's price may be mistaken, we have held that it is solely the responsibility of the contracting parties--the government and the low offeror--to assert rights and bring forth the necessary evidence to resolve mistake questions. A protester has no standing to claim an error in a competitor's offer. Window Systems Engineering, B-222600, June 2, 1986, 86-1 C.P.D. ¶ 509. The protest is dismissed as to this ground.

Apart from the fact that this is not a sealed bid procurement, Keyes has presented no authority for its position that a low price in and of itself renders a "bid" "nonresponsive." We have repeatedly held that there is nothing legally objectionable in the submission and acceptance of a below-cost offer under a solicitation for a firm-fixed-price contract. A firm's ability to perform the contract at the offered price is a matter of responsibility for the contracting agency to determine before award. Our Office does not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith by government officials or that definitive responsibility criteria have not been met. See Window Systems Engineering, B-222600, supra, at 2. In its initial protest, which did not even mention the concept of responsibility, Keyes alleged neither exception.

Whether Fonda will, in fact, supply plates meeting the specification requirements is a matter of contract administration which our Office will not review as part of our bid protest function. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(1) (1986).

In its report on this protest, GSA explained its evaluation of offers and the basis for its decision to award line item 25 to Fonda. In its comments on that report following a conference at our Office, Keyes questioned whether (1) GSA could have made a good faith determination of Fonda's "responsiveness and responsibility" given the information available to it; (2) "whether the contracting officer abdicated her duty to make a responsibility determination"; and (3) whether GSA "improperly waived compliance with the delivery terms and commercial item certification requirements of the solicitation for one bidder only."

The protester's argument that the contracting officer could not in good faith have found Fonda responsible is based on a prenegotiation memorandum signed and dated by GSA's contract specialist and contracting officer on August 14 and September 22, 1986, respectively. The memorandum states in part:

"Substantial competition was received with three offerors competing on this item (item 25). Financial and plant facility preaward surveys will be conducted in accordance with FAR 9-106.1 since the firm (The Fonda Group, Inc.) was not a prior contract period contractor, therefore a determination of responsibility could not be assured.

"The negotiation objective is to obtain prices that can be determined fair and reasonable and which range between the prior contract award pricing and the lowest competitors' offer pricing."

The protester argues that the contracting officer's September 29 award of the contract to Fonda contradicts her inability 1 week earlier to find the firm responsible, and that this unexplained reversal suggests either that the contracting officer abdicated her duty to make a nonresponsibility determination, or that she proceeded with award in the face of negative preaward survey information concerning Fonda.

GSA discounts the importance of the prenegotiation memorandum, stating that this "routine document" was prepared to satisfy the administrative requirements of Federal

Acquisition Regulation, FAR, 48 C.F.R. § 15.807, which requires the contracting officer to establish prenegotiation objectives before the negotiation of any pricing action. With regard to the 5-week discrepancy between the contracting specialist's and the contracting officer's signature, GSA has provided a memorandum from the contract specialist in which he states:

"The prenegotiation memorandum was written by the Contract Specialist . . . , signed and dated on August 14, 1986. The memorandum was not forwarded for signature to the Contracting Officer (CO), . . . , in a timely manner by the Specialist. The memorandum was inadvertently set-aside while attention was diverted to the processing of contracts requiring [special] clearance The memorandum did not come to the CO's attention until the file was forwarded for contract award approval. The memorandum was then signed (September 22, 1986) on the same date that the Recommendation for Award . . . was signed. Contract award was subsequently made on September 29, 1986."

We have no reason to disbelieve the contract specialist's account of these events. In fact, the record suggests that events had overtaken the preparation and signing of the prenegotiation memorandum.^{2/}

Specifically, the record shows that in June, 1986, GSA's Credit and Finance Division surveyed Fonda's financial capability, found it satisfactory, and recommended "complete award." Also in June, a survey was conducted of Fonda's California production facility in which some deficiencies were found. In July, a survey was conducted of Fonda's Vermont production facility, as a result of which the survey team concluded that Fonda was capable of performing because its past performance, production capacity, quality control system and purchasing procedures all were satisfactory. A mid-August supplemental preaward survey of Fonda's California plant revealed that the deficiencies noted during the earlier visit had been remedied, except for the acquisition of a

^{2/} That the "prenegotiation" memorandum was an after-the-fact document is indicated by the facts that negotiations actually had concluded over 2 months before the contract specialist signed the memorandum and that GSA already was well underway in conducting the surveys necessary to determine Fonda's responsibility.

small oven and a rigidity testing machine needed for quality assurance tests. Both of these items, however, were on order.

As of September 22, therefore, when the contracting officer signed the "pre-negotiation memorandum" and a recommendation for award to Fonda, she was in possession of positive preaward survey reports as to Fonda's financial capability and as to both its California and Vermont production facilities. Whether on the basis of this information Fonda could be determined to be a responsible prospective contractor was a matter of business judgment to be exercised by the contracting officer which, as we stated earlier in this decision, we will not review absent a showing of fraud or bad faith. To make this showing, the protester has a heavy burden of proof as contracting officials are presumed to act in good faith. See Nations, Inc., B-220935.2, Feb. 26, 1986, 86-1 C.P.D. ¶ 203. The protester has made no showing of bad faith.

The record simply does not bear out the protester's speculation that the award to Fonda resulted from an "unexplained reversal" by the contracting officer as to Fonda's responsibility. That firm was awarded the contract following the contracting officer's receipt of favorable preaward surveys of its financial capability and plant facilities. The protester's disagreement with the contracting officer's determination does not suffice to show that the contracting officer acted fraudulently or in bad faith. Id. We have no basis to object to GSA's affirmative determination that Fonda was responsible and as to this basis the protest is denied.

Finally, the protester argues that GSA improperly relaxed the delivery schedule and commercial item requirements of the RFP solely for Fonda without permitting other offerors to compete on the same basis. There is no merit to these contentions.

With regard to the delivery schedule, the record shows that approximately 3 months after award, GSA and Fonda agreed to a modification of the contract in which the production point was changed from California to Vermont and the delivery dates under certain purchase orders were extended by 3-4 weeks in exchange for a reduction in contract price. There is no indication in the record, however, that at the time of receipt of offers and of award that GSA contemplated an extension of the delivery schedule.

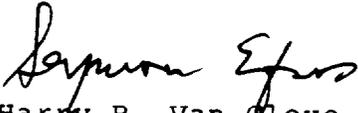
As a general rule, we have refused to review protests based upon contract modifications since modifications are primarily

a matter of contract administration and thus primarily the responsibility of the contracting agency. See 4 C.F.R. § 21.3(f)(1) (1986); Devils Lake Sioux Mfg. Corp., 64 Comp. Gen. 578 (1985), 85-1 C.P.D. ¶ 638. The only exception to this rule is where it is alleged that the modification is beyond the scope of the original procurement. The modification in this case does not meet this standard and consequently we will not consider the merits of Keyes' argument.

Keyes also maintains that GSA waived for Fonda the solicitation requirement that the product offered be a "commercial" or "commercial-type" product as defined in the RFP. Keyes argues that since at the time of the supplemental preaward survey of Fonda's California facility it did not have on hand the oven and rigidity tester needed to perform the tests described in the CID, Fonda did not demonstrate that it had the capability to commercially produce the item being purchased and GSA's award of a contract to it amounted to a waiver of the commercial product requirement.

We do not believe the fact that at one of its plants at the time of a preaward survey Fonda did not have on hand two items of equipment needed to test its plates to the government standards stated in the CID amounts to a showing that contrary to its certification Fonda would offer, and GSA intended to accept, a noncommercial item. First, the RFP's commercial item certification stated that by signing the offer the offeror certified that the items offered were commercial items. Whether an offeror will supply an item which complies with such a certification is a matter of responsibility. Second, GSA's preaward surveys of Fonda, a well-established producer of paper plates for commercial customers, indicate that Fonda did have a full complement of testing equipment at its Vermont plant and had on order the necessary equipment for its California plant. Under these circumstances, we do not believe the record supports the conclusion that GSA waived for Fonda the requirement that it provide a commercial product.

The protest is dismissed in part and denied in part.

for 
Harry R. Van Cleve
General Counsel