



The Comptroller General
of the United States

Washington, D.C. 20548

Zelkowitz - PC

Decision

Matter of: Canadian General Electric Company, Ltd.
File: B-223934.2
Date: July 10, 1987

DIGEST

1. Protest based upon information received under Freedom of Information Act (FOIA) is timely, notwithstanding failure of protester to seek information under FOIA until 3 months after award, where the record shows that the protester made a consistent effort to obtain information regarding its basis of protest.
2. Protest that contracting agency improperly allowed the awardee to change place of manufacture specified in both steps of a two-step sealed bidding procurement is denied where the record discloses that the preaward requested change was not incorporated into the contract.
3. Allegation that awardee fraudulently represented its intention to furnish an item manufactured entirely in the United States is denied as the evidence presented by the protester, which consisted of the awardee's performance of other contracts, does not conclusively demonstrate that the awardee could not have manufactured the item in the United States.
4. A showing of bad faith on the part of a contracting officer in conducting responsibility determination of awardee requires virtually irrefutable proof of specific and malicious intent to harm the protester. A showing that the contracting officer may have acted negligently in reaching this determination is not sufficient to carry this burden, and our Office's scope of review of affirmative responsibility determinations does not extend to cases involving negligence.

DECISION

Canadian General Electric Company, Ltd., protests the award of a contract to Siemens Energy and Automation, Inc., under request for technical proposals (RFTP) No. DACW85-86-R-0006

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and invitation for bids (IFB) No. DACW85-86-B-0016, both steps of a two-step sealed bidding procurement issued by the U.S. Army Corps of Engineers, Alaska District. The procurement is for the design, manufacture and installation of a 34,500 kva alternating current generator for a hydroelectric power project at Snettisham, Alaska. Canadian General raises three bases of protest. First, the Corps improperly allowed Siemens to change the manufacturing site of a major component during the period between bid opening and contract award; second, Siemens fraudulently misrepresented its intended place of manufacture of that component in its step-one proposal and step-two bid; and third, the contracting officer, when determining Siemens' responsibility as a vendor, acted in bad faith by failing to investigate thoroughly compelling evidence clearly indicating Siemens' manufacturing difficulties which eventually resulted in a postaward change of the manufacturing site for the entire generator.

We deny the protest.

BACKGROUND

Step one, the RFTP, was issued on January 31, 1986, requesting technical proposals for the generator. Four firms, including Siemens and Canadian General, submitted technically acceptable proposals. Only Siemens proposed to furnish a product manufactured entirely in the United States, specifically at its Bradenton, Florida, facility. The second-step IFB was issued on June 13, 1986, to the four technically acceptable offerors. Bids were to be based on the bidder's technical proposal submitted in response to the RFTP. The IFB provided that for the purpose of evaluating bids, a sum of \$88,000, representing additional inspection costs to the government, would be added to the net amount for generators, or major components thereof, manufactured outside of the United States or Canada; also, the generator prices would be decreased according to a prescribed formula depending upon the proposed generator's guaranteed efficiency.

Bids were opened on August 8, 1986. Siemens submitted the low bid of \$1,497,500, (evaluated at \$952,995) while Canadian General was second low at \$2,297,281 (evaluated at \$1,618,744). Consistent with its technical proposal, Siemens left the Buy American Act certificate included in its bid package blank, thereby certifying that the product it was offering was a domestic end product. It also indicated that all articles, materials and supplies directly incorporated into the end product were of domestic origin. All other bidders continued to offer foreign products.

By letter dated September 12, 1986, Siemens advised the procuring activity of production difficulties at its Bradenton facility in the manufacture of stator bar/coils, a component comprising approximately 20 percent of the total cost of the generator. Siemens requested permission to subcontract the manufacture of this component to one of its parent company's facilities located in Berlin, West Germany. This proposed change, Siemens stated, would not result in any increase cost to the government. Moreover, Siemens stated that this change did not alter the Buy American Act certification in its bid; however, it would necessitate a change in the percentage, specified in its bid, of the cost of all articles, materials and supplies directly incorporated into the generator from zero to 20 percent.

Subsequently, the procuring activity awarded the contract to Siemens on September 25, 1986.

TIMELINESS

The Corps contends that Canadian General's protest should be dismissed as untimely under our Bid Protest Regulations. Following the late September award, Siemens, on October 23, 1986, issued a public announcement regarding the closure of its Florida facility. Canadian General filed a Freedom of Information Act (FOIA) request seeking documents regarding this closure on December 22. The Corps responded to the request on January 5, 1987, by giving the protester a November 24, 1986, letter in which Siemens requested permission to manufacture the entire generator at one of its foreign plants.

The Corps argues that the protester did not file a FOIA request promptly reflecting the required diligent pursuit of information. The Corps maintains that the October 23 public announcement should have put Siemens on notice that the award may have been affected. The Corps notes that Canadian General did not file its initial protest with our Office until March 11, which was followed by a supplemental filing on March 26.

Canadian General responds that any delays in the filing of its protest were directly attributable to the Corps' failure to release all documents relating to the agency's dealing with Siemens. The Corps' initial response to its FOIA request was cursory and incomplete. Only upon receipt of additional documents in March from another source and the Corps did Canadian General have sufficient information to file a protest with our Office.

The critical fact underlying each of the three bases of Canadian General's protest is the existence and content of the September 12 letter from Siemens to the Corps regarding production difficulties at Siemens' Bradenton, Florida, facility. The key date for determining the timeliness of this protest, therefore, is the date when Canadian General first became aware of, or should have been aware of this letter. Under our Bid Protest Regulations, Canadian General had 10 working days from the earlier of these two dates, in which to file its protest. 4 C.F.R. § 21.2(a)(2) (1986).

Siemens' October 23 public disclosure did not place Canadian General on notice of the September 12 letter. While the reasons for Canadian General's 2-month delay in filing its FOIA request are unclear, the record does show a consistent effort on Canadian General's part over a 6-month period to ascertain the actual circumstances from the Corps and several other sources. Because of this, we will not dismiss its protest for failing to pursue relevant information. As the Corps has not disputed Canadian General's position that it first received the critical September 12 letter until March, we find that Canadian General's protest of March 11 is timely.

MERITS

Canadian General maintains that the September 12 letter seeking permission to transfer the manufacture of the stator bar/coils to West Germany, received by the Corps between bid opening and contract award, constituted an impermissible change in Siemens' step-one proposal and step-two bid. In this regard, Canadian General notes that counsel for the agency admitted during the bid protest conference that the "change" was an error in judgment. Under the rules governing two-step sealed bidding, Canadian General argues, each bidder's intended place of manufacture was locked in upon acceptance of the step-one proposals and that step-two bids had to be submitted upon that basis. If not, bidders could improperly be allowed to improve their price positions and such bids should be rejected as nonresponsive. To allow Siemens to effectuate this change, Canadian General adds, the procuring activity would have had to reopen the step-one phase thereby affording each competitor the opportunity to modify its proposal.

Canadian General also argues that the Corps ignored the consequential cost impact resulting from Siemens' proposed change in place of manufacture. Because Siemens was no longer offering a 100 percent domestic product, a foreign inspection charge of \$88,000, a duty of 3 percent, but no

more than \$45,000, and possibly, a Buy American Act evaluation differential amounting to \$90,000, dependent upon the value of the component to be manufactured in Germany, should have been imposed on Siemens' low bid.

The contracting officer's report and conference comments denied that before award the agency acquiesced in or accepted the "change." Despite the conflicting statements of the parties, this matter is resolvable by examining the awarded contract. The contract, as initially executed, provided that Siemens would furnish a generator manufactured entirely in the United States. The contract did not include, or refer to the September 12 letter requesting permission to manufacture a portion of the generator in West Germany. Further, the record is devoid of any evidence indicating that the contracting activity consented to Siemens' September 12 request prior to award. Therefore, we conclude that the Corps did not allow Siemens to modify its bid, with respect to its intended place of performance or the domestic nature of the item offered, during the period between bid opening and contract award. In view of this, we find no impermissible change in Siemens' proposal or bid such as to have required the agency to reopen step-one negotiations. Because of this conclusion, it is unnecessary to discuss Canadian General's cost impact argument; however, we observe that viewing Siemens' bid as foreign, adding the appropriate evaluation factor costs would decrease the evaluated price difference by only approximately 15 percent.

Canadian General next asserts that Siemens fraudulently represented in both its step-one proposal and step-two bid that it would furnish a generator manufactured entirely at its Florida facility. Even before the submission of step-one proposals, and certainly before the submission of bids, Canadian General maintains Siemens was aware of production difficulties at its Florida facility; therefore, Siemens knew that it would be unable to manufacture the generator domestically. Nevertheless, Canadian General continues, Siemens stated in its technical proposal that it would supply a domestically manufactured generator, and further, in its bid, certified for Buy American Act purposes that it would furnish a domestic end product, and stated that all articles, materials and supplies directly incorporated into the end product were of domestic origin. The evidence presented by Canadian General in support of this allegation essentially consists of references to Siemens' performance of other contracts, most notably, a contract executed on February 21, 1986, with the Bureau of Reclamation to upgrade and repair two generators at the Blue Mesa power plant, and another awarded during 1985 to refurbish six generators for the Public Utility District of Grant County, Washington. Throughout 1985 and 1986, Canadian General states, Siemens

experienced extreme difficulties at its Florida facility during performance of both of these contracts which culminated in its transferring of part of the work for the Blue Mesa project to West Germany and its termination of the contract with the Public Utility District of Grant County.

Canadian General has not conclusively demonstrated that Siemens could not have utilized the Florida plant to perform the subject contract and therefore we consider it insufficient to support a finding of fraudulent conduct. Accordingly, Canadian General has not met its burden of affirmatively proving its case. See Omnitek Inc., B-214445, July 9, 1984, 84-2 CPD ¶ 27.

Additionally, to the extent that Canadian General is alleging that Siemens' conduct was criminal in nature--for example, a violation 18 U.S.C. § 1001, which imposes criminal penalties for knowingly making false statements to the government--this matter is outside the scope of our bid protest function and should be referred to the Department of Justice. See Computer Science, Corp., B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422.

Lastly, Canadian General asserts that the contracting activity should have been aware prior to award of Siemens' inability to furnish a domestically manufactured generator. Therefore, the contracting officer's determination that Siemens was a responsible vendor, i.e., that Siemens, in compliance with its bid, could supply a domestic end product, was made in bad faith. We find that the record does not support this conclusion.

Contracting officials are presumed to act in good faith, and in order to show otherwise, a protester must submit virtually irrefutable proof that they had a specific and malicious intent to harm the protester. See J. F. Barton Contracting Co., B-210663, Feb. 22, 1983, 83-1 CPD ¶ 177.

The evidence presented by Canadian General in support of this allegation consists of the above-mentioned Siemens' performance of other contracts. By failing to examine this pertinent information, Canadian General maintains, the contracting officer did not act in good faith. The Corps responds that prior to award it conducted a pre-award survey of Siemens. During this investigation, it discovered that Siemens had in fact experienced production difficulties at its Florida plant during performance of the Blue Mesa project but that Siemens had overcome these production problems. The Corps admits that it was unaware of Siemens performance on the Grant County project.

This evidence falls far short of the high standard of proof required to show bad faith and, more specifically, an intent on the part of the contracting officer to harm Canadian General. The worst inference to be drawn from this evidence is that the contracting officer's determination of Siemens' responsibility, which was made without first examining all pertinent data, was negligent. See Aesculap Instruments Corp., B-208202, Aug. 23, 1983, 83-2 CPD ¶ 228. We have held, however, that the scope of our review of affirmative responsibility determinations does not extend to cases involving negligence. American AMF Inc., Athletic Equipment Division--Reconsideration, 59 Comp. Gen. 90 (1979), 79-2 CPD ¶ 344.

The protest is denied.


- Harry R. Van Cleve
General Counsel