The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dresser Industries, Inc.

File: B-228324

Date: December 29, 1987

DIGEST

Solicitation provision which calls upon bidders at the request of the contracting officer, to demonstrate their experience by supplying evidence of the commerciality of the equipment being offered or similar equipment, is a definitive responsibility criterion which looks to the manufacturer's capability rather then to the product history of the particular model solicited. Consequently, an experienced manufacturer who bids its newest model may be deemed responsible even though the offered model does not meet the requirements of the solicitation provision (i.e., was not marketed for the stated period of time prior to bid opening).

DECISION

Dresser Industries, Inc. protests the award of a contract to Deere & Company by the Defense Logistics Agency (DLA) under invitation for bids (IFB), No. DLA700-87-B-4514 for a quantity of four cubic yard scoop loaders. Dresser argues that the product offered by Deere fails to meet the commerciality requirements of the solicitation.

We deny the protest.

The solicitation called for the submission of bids for a quantity of four cubic yard scoop loaders, built in accordance with Federal Specification KKK-L-1542C as amended by the terms of the solicitation. Of particular importance for purposes of this protest is a provision (clause 3.1.1) added by the solicitation to the above-referenced federal specification which reads as follows:

> "Commerciality. The manufacturer shall be experienced in designing and building scoop loaders and shall have sold them to the general

> public at least one year prior to the opening date of the solicitation. Upon request of the contracting officer, offerors shall submit evidence of the commerciality of their machines in the form of catalogs, commercial brochures and data. Additionally, these bidders shall furnish names and addresses of nongovernment sources which were sold equipment at least one year prior to the opening date of the solicitation. Equipment and configurations covered by this paragraph include the basic vehicle configuration (body, engine, tires, cab, counterweights, coupler and all buckets) as well as either; 1. All equipment specified in ordering data, or 2. A minimum of 15 optional and allied equipment items applicable to 4 yard loaders which are described in paragraphs 3.24.1 and 3.24.2."

The solicitation, in a separate provision, required bidders either to certify that "[t]he loader shall be essentially the standard current product of the manufacturer, differing therefrom only in respect necessary to meet special requirements," or (for bidders failing to certify) to comply with a warranty provision contained in the solicitation.

At bid opening on August 18, 1987, a total of six bids were received. The apparent low bid was submitted by Deere, followed by J.I. Case Company and Dresser respectively.1/ A contract was thereafter awarded to Deere as the low responsive, responsible bidder.

In its initial letter of protest, Dresser alleged that the product offered by Deere failed to meet the "commerciality" requirement of the solicitation. Specifically, Dresser stated that, given the price bid by Deere, Deere allegedly had offered a substantially modified version of its model 644D scoop loader, which was not a "commercial" item.

By letter dated October 9, Deere stated to our Office that Dresser's assumption--that it had based its bid on a significantly modified version of its model 644D loader--was incorrect. According to Deere's letter, Deere had based its bid on its model 644E-H. Deere's October 9, submission

---

1/ Although J.I. Case submitted the apparent second low bid, the product offered by it was to be substantially manufactured in Brazil. Consequently, after application of the price differential required under the Buy American Act, 41 U.S.C. § 10 et seq. (1982), the Dresser bid was determined to be the second low responsive bid.

included a commercial brochure dated September 1987, which details the features of its model 644E-H. We note that Deere's model 644E-H is a new model, introduced officially on the market subsequent to the time of bid opening.

As a threshold matter, the agency has argued that Dresser's protest is untimely. Specifically, the agency argues that since the protester's interpretation of the commerciality clause is "unreasonable," but if correct would constitute an impropriety apparent on the face of the solicitation, it should have protested prior to bid opening in accordance with our Bid Protest Regulation, 4 C.F.R. § 21.2(a)(1) (1987).

We disagree with the agency. Bidders may assume that contracting officials will act in accordance with law and regulation, and it is only when they learn that officials will not act or proceed in a fashion that is consistent with what the bidder reasonably believes to be correct that a basis of protest arises. See R.R. Gregory Corp., B-217251, Apr. 19, 1985, 85-1 CPD ¶ 449. Within the context of this case, we believe that Dresser was entitled to assume that the agency would act in conformance with Dresser's interpretation of the commerciality clause until award to Deere was made. After award, Dresser was required to file its protest within 10 working days under 4 C.F.R. § 21.2(a)(2); since it filed within this time, we believe the protest to be timely.

Turning to the merits of the protest, Dresser argues that the product offered by Deere--its 644E-H model--fails to meet the requirements of the solicitation's commerciality clause. In particular, the protester argues that the commerciality clause requires that the product offered have been commercially available and sold for a minimum of 1 year prior to bid opening. The protester further states that, whether we consider this a matter of Deere's responsiveness or responsibility is unimportant since even up to the time of award, Deere was unable to comply with the terms of the commerciality clause.

The agency on the other hand argues that, to the extent we consider this a matter of responsiveness, Deere's bid took no exception to the terms of the solicitation's specifications and, consequently, the question of whether the product in fact complies with the specifications is a matter of contract administration. The agency also argues that, insofar as the commerciality clause is a definitive responsibility standard, it goes to the manufacturer's experience in building scoop loaders rather than to the particular scoop loader offered and, thus, Deere could

reasonably be deemed responsible, having commercially sold similar scoop loaders for at least 1 year.

In our opinion, the commerciality clause contained in this solicitation constitutes a definitive responsibility standard. In 52 Comp. Gen. 648 (1973), we discussed the distinction between responsibility and responsiveness within the context of experience requirements contained in solicitations. There we stated that we considered experience requirements which go to the performance history of the item being procured as matters of responsiveness whereas, experience requirements which go to the experience of the bidder--which could be demonstrated through the performance history of either the item being procured or some other similar product offered by the bidder--were matters of responsibility. 52 Comp. Gen. at 649-650 (1973). As explained below, we believe the commerciality clause in this case is properly interpreted as requiring that the manufacturer demonstrate its experience in building scoop loaders generally (as distinct from demonstrating the performance history of the particular model solicited) and thus that it falls into the latter category. Further, we believe that the commerciality clause in this case is a definitive responsibility criterion imposed in addition to the traditional requirements of responsibility, and is therefore reviewable by this Office since compliance therewith may be objectively determined. See Clausing Machine Tools, B-216113, May 13, 1985, 85-1 CPD ¶ 533.

With respect to satisfying the requirements of the commerciality clause in this case, we believe that bidders could do this by submitting evidence of the commerciality of either the offered loader or a similar product. First, the clause consistently employs plural rather singular terms; "[t]he manufacturer shall be experienced in designing and building scoop loaders . . ." ". . .offerors shall submit evidence of the commerciality of their machines . . . ." "[e]quipment and configurations covered by this paragraph include . . . ." Second, under the separate certification requirement, bidders were afforded the option of either certifying their offered product as "essentially their standard current product" or alternatively warranting a product which was other than "essentially their standard current product." Reading the solicitation as a whole, we believe that a bidder could offer a product which was other than its "standard current product;" it would be inconsistent however, to then require it to demonstrate the commerciality of only that product. Finally, the commerciality clause, by its own terms, allows bidders to demonstrate the commerciality of their scoop loaders either by demonstrating the commerciality of the offered loader (i.e., to basic vehicle configuration plus all equipment

specified in the ordering data) or by demonstrating the commerciality of a similar loader (i.e. the basic vehicle configuration plus a minimum of 15 optional and allied equipment items applicable to four yard loaders).

For the above stated reasons, we believe that the commerciality clause contained in this solicitation could be satisfied through evidence of a bidder's having manufactured and marketed either the exact scoop loader called for or a similar scoop loader. Stated differently, the clause calls for evidence of the manufacturer's ability rather than the product's performance history. Accordingly, since Deere (although not called upon to do so) could have demonstrated the commerciality of its scoop loaders which are similar to the offered model, we conclude that the agency properly found it responsible and award was proper.

The protest is denied.

James F. Hinchman
General Counsel