The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Glove Company, Inc.

File: B-229690

Date: December 23, 1987

DIGEST

Protest that proposed awardee will not be able to satisfy solicitation clauses concerning preaward survey, preproduction milestones, and production capacity is dismissed since the clauses are not definitive responsibility criteria, i.e., specific, objective standards measuring the offeror's ability to perform, but, rather, concern factors encompassed by the contracting officer's subjective responsibility determination or contract administration, both of which are matters not for review by the General Accounting Office.

DECISION

Nationwide Glove Company, Inc. protests award to the apparent low bidder, Propper International, Inc., under invitation for bids (IFB) No. DLA100-87-B-0782, issued by the Defense Logistics Agency for a quantity of light duty gloves. Nationwide contends that Propper cannot satisfy certain solicitation clauses that the protester characterizes as definitive responsibility criteria.

We dismiss the protest.

Nationwide protests that Propper cannot satisfy the following three solicitation clauses: (1) clause 52.209-L002, entitled "Preaward Plant Survey," in which the government reserves the right to conduct physical surveys of plants which are to be used in contract performance; (2) clause 52.212-H004, entitled "Preproduction Milestones," in which bidders were to indicate the number of days after award for specifically requested preproduction milestones; and (3) clause 52.215-M001, entitled "Production Capacity," which permitted offerors to limit acceptance of offers depending on awards they might receive under other solicitations. The basis of the protester's belief that these alleged definitive responsibility criteria cannot be met is Propper's alleged failure to perform satisfactorily on a prior contract.

As a challenge largely to Propper's ability and capacity to perform, the protest here involves the issue of Propper's responsibility. Our Office will not review protests against affirmative determinations of responsibility unless either possible fraud or bad faith on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. See 4 C.F.R. § 21.3(f)(5) (1987); Yale Materials Handling Corp.--Reconsideration, B-226985.2, et al., June 17, 1987, 87-1 CPD ¶ 607. Definitive responsibility criteria are objective standards established by a contracting agency in a particular procurement to measure the offeror's ability to perform the contract. Repco, Inc., B-225496.3, Sept. 18, 1987, 87-2 CPD ¶ 272. Such criteria in effect represent the agency's judgment that an offeror's ability to perform in accordance with the specifications for the procurement must be measured not only against the traditional and subjectively evaluated factors, such as adequate facilities and financial resources, but also against more specific requirements, compliance with which at least in part can be determined objectively, for example, a requirement for unusual expertise or specialized facilities. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-2 (1986); Repco, Inc., supra.

Here, the IFB clauses cited by the protester do not set out specific, objective standards for measuring the offeror's ability to perform; rather, the provisions express in general terms factors encompassed by the contracting officer's subjective responsibility determination, or concern whether the successful bidder actually performs in compliance with contract requirements. As a result, we do not find that the clauses cited by the protester constitute definitive responsibility criteria, and thus their alleged misapplication is not for review by this Office.

Concerning the preaward plant survey clause, the IFB specifically states that the purpose of the clause is to determine the responsibility of prospective contractors. The FAR requires, as a general standard of responsibility, that a prospective contractor have the necessary production facilities. 48 C.F.R. § 9.104-1(f). The preaward plant survey clause here does not contain any requirement for specialized facilities; accordingly, it cannot be considered a definitive responsibility criterion.

The production capacity clause, permitting offerors to limit acceptance of their offers depending on awards they may receive under other solicitations, also is not a specific, objective standard for measuring an offeror's ability to perform, and thus is not a definitive responsibility criterion. The clause merely enables an offeror to submit

its offer based on the stipulation that it will not receive an award under other specified solicitations; if the offeror receives any of those awards, the clause would operate to remove the offeror from consideration for the current award. The clause does not, as Nationwide contends, establish any specific standard for judging an offeror's capacity to perform several contracts contemporaneously; a prospective contractor's ability to comply with the required delivery/ performance schedule, taking into consideration all existing commercial and governmental business commitments, is part of the general responsibility determination. FAR, 48 C.F.R. § 9.104-1(b).

The clause requiring the contractor to furnish dates for preproduction milestones is not directly related to responsibility; rather, as indicated in the IFB, it is to be used by the contracting officer to monitor the performance of the successful offeror. Whether the successful offeror actually performs in compliance with the milestone dates, which will become a part of the contract, is not a definitive responsibility criterion, but a matter of contract administration, which is not for consideration under our Regulations. 4 C.F.R. § 21.3(f)(1); Descomp Inc., B-220085.2, Feb. 19, 1986, 86-1 CPD ¶ 172.

As for the protester's allegation of prior poor performance by Propper, under the FAR and our prior cases the circumstances surrounding an offeror's prior performance is only one of several relevant factors that should be considered by the agency when reviewing a prospective contractor's responsibility. FAR, 48 C.F.R. § 9.10-41(c); see C.W. Girard, C.M., 64 Comp. Gen. 175 (1984), 84-2 CPD ¶ 704. Again, an affirmative determination of responsibility, made after consideration of prior performance, would not be reviewable by this office, except under circumstances not shown here.

Finally, the protester maintains that the agency cannot make award to Propper because it would essentially be reprocuring supplies at a price greater than the price of a previous contract on which Propper allegedly has failed to perform. The protester cites a number of our previous decisions in support of its argument; however, the firm has erroneously interpreted these decisions. The cases cited by the protester hold that, in a reprocurement to complete work under a defaulted contract, a repurchase contract may not be awarded to the defaulted contractor at a price that would give the contractor more than the terminated contract price, because this would be tantamount to modification of the terminated contract without consideration. See, e.g., Preston-Brady Co., Inc., B-211749, Oct. 24, 1983, 83-2 CPD ¶ 479. Since there is no indication here that the instant

solicitation is a reprocurement to complete work under a defaulted contract, the rule cited by the protester is inapplicable.

Accordingly, we find that Nationwide Glove has not stated a valid basis of protest, and we dismiss the protest pursuant to our Regulations without requesting a report from the agency. 4 C.F.R. § 21.3(f). In view of this dismissal, we also find that the conference the protester has requested would serve no useful purpose. Hettich GmbH and Co. KG, B-224267, Oct. 24, 1986, 86-2 CPD ¶ 457.

The protest is dismissed.

Ronald Berger

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