

Kozinn



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Idaho Norland Corporation

File: B-230598

Date: June 6, 1988

DIGEST

1. Protest against solicitation specification is untimely when it is not filed with either the procuring agency or the General Accounting Office before the closing date for receipt of initial proposals. Alleged improprieties that are apparent on the face of a solicitation must be filed by that date.
2. Protest that agency improperly rejected firm's initial proposal for failure to comply with material solicitation requirement for gear driven rotary auger snow plow is denied where protester fails to show that its offer complied with specification and where drawings submitted with protester's proposal reasonably show protester took exception to material requirement by offering a chain driven rotary auger.
3. The determination of the acceptability of an offeror's technical proposal is primarily the responsibility of the procuring agency and will be questioned only upon a showing of unreasonableness or that the agency violated procurement statutes or regulations, neither of which has been shown here.
4. Contracting officer's determination of price reasonableness will not be disturbed absent a showing of bad faith or fraud.

DECISION

Idaho Norland Corporation protests the award of a contract to Rudy Yost Equipment under request for proposals (RFP) No. 7PN-71756-G5/7FX, issued by the General Services Administration (GSA) for a gear driven rotary auger snow plow/blower for use by the National Park Service at Mount

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Rainier National Park. Idaho protests the solicitation's specifications as restrictive of competition and complains that its offer was improperly rejected as technically unacceptable.

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

GSA issued the solicitation on September 4, 1987, and four proposals were received by the closing date of October 20, 1987. The GSA awarded the contract on December 29, 1987, to Rudy Yost Equipment, the firm that had submitted the only technically acceptable proposal, and notice of the award was published in the Commerce Business Daily on January 15, 1988. After denial of its agency-level protest, on March 1, 1988, Idaho filed a protest with the GSA Board of Contract Appeals (GSBCA), which action was subsequently dismissed without prejudice on March 18, 1988. Idaho filed the instant protest with the General Accounting Office (GAO) on March 3, 1988.^{1/}

In its protest letter, Idaho complains that the solicitation's specifications were vague and in some cases contradictory, and that the requirement that the snow removal unit's rotary auger be gear driven is restrictive of competition in that it favors one manufacturer. We note, however, that our Bid Protest Regulations require that protests based on alleged improprieties apparent on the face of the solicitation be filed either with the procuring agency or our Office before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1988). The record shows that Idaho did not protest this specification prior to the closing date for receipt of initial proposals. Accordingly, this ground of protest is untimely filed and we will not consider it. Micronics, Inc., B-228404, Feb. 23, 1988, 88-1 CPD ¶ 185.

The RFP included a requirement that the snow removal unit be the manufacturer's standard commercial product, that is, built on a production basis. The RFP also included as one of the product's requirements that the rotary auger be gear driven. The product offered by Idaho was found not to conform to this RFP requirement since Idaho's proposal offered a chain driven auger instead of the required gear driven rotary auger. GSA found that Idaho thereby took exception to a material requirement of the solicitation and

^{1/} On March 7, 1988, the GSBCA informed our Office that it would dismiss Idaho's protest for lack of jurisdiction. Based upon this verification, we concluded we could consider Idaho's protest. See, e.g., AT&T Technologies, Inc., B-221379, Jan. 24, 1986, 86-1 CPD ¶ 90.

found its proposal to be technically unacceptable. Idaho contends that its proposal should not have been found unacceptable since its product allegedly can meet the government's performance and warranty requirements equally as well as, if not better than, the awardee's product. Idaho claims that it and other manufacturers have used a chain driven auger for years with good results and that its product can meet or exceed the solicitation's requirement for a minimum performance of 1,300 tons per hour at a 125 feet casting distance.

Although Idaho admits in its protest letter that it did not offer a gear driven product as required, it contends that it did not take exception to the requirement. Based upon verbal assurances Idaho claims it received from a GSA engineer that if it was the low bidder and met the performance and warranty requirements it could expect to be awarded the contract, Idaho contends that it was not necessary to meet the solicitation's requirement for a gear driven auger. We have consistently held, however, that a contractor's reliance on oral advice from the personnel of the procuring agency that an offer taking exception to the RFP's requirements would not be rejected is clearly unreasonable where that advice, as it is here, is inconsistent with the written specifications and with the fundamental principle that an agency may not solicit offers on one basis and then make award on another basis. American Bank Note Co., B-222589, Sept. 18, 1986, 86-2 CPD ¶ 316; see also ATD-American Co., B-227324, July 28, 1987, 87-2 CPD ¶ 103.

Therefore, the issue is whether or not Idaho offered a nonconforming product and was, therefore, justifiably found technically unacceptable. GSA rejected Idaho's proposal based upon drawings submitted by the protester that reasonably show it was offering a chain driven rotary auger. GSA found that this reflected a material exception to the solicitation's requirement and rendered the protester's proposal unacceptable.

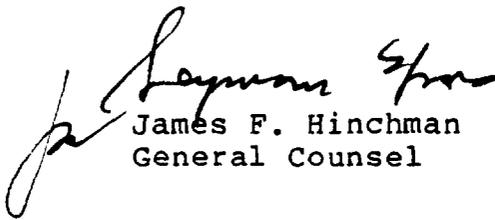
The contracting agency has the primary responsibility for determining its minimum needs and for determining whether an offered item will satisfy those needs since it is the agency that must bear the burden of difficulties incurred by reason of a defective evaluation. Sony Corp. of America, B-225512, Feb. 24, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 212. The record shows that the protester has offered no evidence to support its position that its proposal offered a model conforming to all the RFP specifications. In fact, the record indicates that the firm offered a nonconforming product. As a result, we cannot find that the protester has met its burden of establishing that the agency should have found that its product complies with all the material

requirements in the RFP. Essex Electro Engineers, Inc., B-229491, Feb. 29, 1988, 88-1 CPD ¶ 215; see also Endure-A-Lifetime Products, Inc., B-219529.2, Oct. 11, 1985, 85-2 CPD ¶ 404. Since Idaho's product did not conform to the requirement for a gear driven rotary auger snow plow, Idaho's proposal was properly found unacceptable. Id.

As to Idaho's protest against the award of the contract to Rudy Yost Equipment, we note that the protester does not challenge the agency's technical evaluation but merely argues that it is more capable of meeting the agency's needs and at a lower price than that offered by the awardee. We have consistently held that the determination of the merits of an offeror's technical proposal is primarily the responsibility of the procuring agency and we will not question that determination absent a showing of unreasonableness or that the agency violated procurement statutes or regulations. See Mictronics, Inc., B-228404, supra. The fact that a protester does not agree with an agency's evaluation of its proposal does not render the evaluation unreasonable or contrary to law. Dalfi, Inc., B-224248, Jan. 7, 1987, 87-1 CPD ¶ 24.

The protester argues that the award price is unreasonable and higher than the price offered by Idaho. First, since GSA properly concluded that Idaho's proposal was technically unacceptable, the fact that Idaho's proposal was lower in cost is irrelevant. See HSQ Technology, B-227935, Oct. 2, 1987, 87-2 CPD ¶ 329. Second, we have recognized that a contracting officer's determination of price reasonableness is an exercise of business judgment which we will not disturb unless it is clearly unreasonable or there is a showing of bad faith or fraud. Imperial Schrade Corp., B-223527.2, Mar. 6, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 254. There is no indication of bad faith or fraud here and the record supports the reasonableness of the award price given the fact that only Rudy Yost's proposal was found technically acceptable and at a price consistent with previous procurements for similar equipment. We therefore will not question the agency's determination of the reasonableness of the award price and deny this protest ground.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel