



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Synthes (U.S.A.)

File: B-231748

Date: August 19, 1988

DIGEST

1. Award on the basis of initial proposals is proper where the solicitation advised offerors of this possibility through incorporation by reference.
2. Whether offeror will deliver equipment meeting specification requirements of request for proposals is not a matter of the technical acceptability of the proposal--where technical proposals were not required--but of the offeror's responsibility. General Accounting Office will not review the contracting officer's affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of contracting officials, or of misapplication of definitive responsibility criteria.
3. The award of a contract constitutes an affirmative determination of responsibility; the decision of whether to conduct a preaward survey prior to such a determination, or to rely on other information, is within the contracting officer's broad discretion.

DECISION

Synthes (U.S.A.) protests the award of a contract to King Manufacturing Company under request for proposals (RFP) No. DLA120-88-R-0609, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA), for basic orthopedic instrument sets. Synthes asserts that award was improperly made on the basis of initial offers, that King is not offering compliant instruments, and that DPSC failed to properly determine that King is a responsible offeror.

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

The RFP specifications include a detailed list of salient characteristics describing the case and the instruments required in the kit, and provides that award will be made to

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the most advantageous offer, cost or price and other factors specified in the solicitation considered. The solicitation did not list any technical factors, nor did it require identification by model number of the equipment to be supplied, nor the submission of technical information for evaluation purposes. The RFP also incorporated by reference the DPSC Master Solicitation. King submitted the lowest price of \$911.32 per kit, for a total of \$54,679.20. Synthes price of \$1,397.25 per kit was the highest of four offers received.

The contracting officer determined that King's price was fair and reasonable based on adequate price competition, that no discussions were necessary and, based on satisfactory performance of identical prior contracts without customer complaints, that King was responsible. Accordingly, on June 10, 1988, DPSC awarded the contract to King. Synthes protested to our Office that King and the other two lower offerors were offering to supply noncompliant equipment, and that award should not have been made on the basis of initial proposals, without discussion.

Regarding the allegation that award was improperly made on the basis of initial offers without discussions, we have held that such an award to the lowest priced offeror is permissible as long as the RFP notifies offerors of this possibility. See SIMCO, Inc., B-229964, Apr. 19, 1988, 88-1 CPD ¶ 383. Here, the RFP incorporated the DPSC Master Solicitation, which in turn incorporates Federal Acquisition Regulation § 52.215-16 (FAC 84-17), which advises offerors that award may be made on the basis of initial offers received, without discussions. Accordingly, this aspect of the protest is denied.

In support of its argument that King is not offering compliant equipment, Synthes asserts that it holds a patent on one of the instruments, and that King's commercial catalogue does not contain certain other required instruments. However, King's offer did not take exception to any of the RFP specifications. Where, as here, an offeror promises to comply with the requirements of an RFP, the contention of a protester that the offeror will be unable to comply with the requirements raises the issue of whether that offeror is responsible. See Racal Survey, Inc., B-228499, Feb. 22, 1988, 88-1 CPD ¶ 178.

While Synthes asserts that DPSC failed to make an affirmative determination of responsibility, the contracting officer's award of the contract to King constitutes such a determination. See Bryant Organization, Inc., B-228204.2, Jan. 7, 1988, 88-1 CPD ¶ 10. Our Office will not object to

the contracting officer's affirmative determination of responsibility absent a showing that the contracting officer acted fraudulently or in bad faith, or that definitive responsibility criteria have been misapplied. Id.; 4 C.F.R. § 21.3(f)(5) (1988). Since there has been no showing of possible fraud or bad faith by the procuring officials or of the misapplication of definitive responsibility criteria, the agency's determination of King's responsibility will not be reviewed by our Office.

For the same reason, we will not review Synthes' allegation that DPSC improperly failed to investigate King prior to awarding the contract, to determine the validity of adverse information relating to King's capability and performance which Synthes states that it brought to the attention of DPSC contracting officials. As noted above, by making the award the contracting officer determined King to be responsible; a preaward survey is not a legal prerequisite to such an affirmative determination of responsibility. Contracting officers have broad discretion concerning whether or not to conduct a survey, and may use other information available to them, such as satisfactory performance of prior contracts, to determine a bidder's responsibility. Hewlett-Packard Co., B-228271, Dec. 3, 1987, 87-1 CPD ¶ 545.

The protest is denied in part and dismissed in part.

for *Seymour Epos*
James F. Hinchman
General Counsel