The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: King Nutronics Corporation

File: B-230914.2

Date: October 6, 1988

DIGEST

1. Allegation that offeror lacks integrity pertains to offeror's responsibility, and General Accounting Office will not review a contracting officer's affirmative determination of responsibility absent a showing of possible agency fraud or bad faith or the misapplication of definitive responsibility criteria contained in the solicitation.

2. Challenge of the legal status of an offeror as a regular dealer or manufacturer under the Walsh-Healey Act is for determination in the first instance by the procuring agency, and is reviewable by the Small Business Administration (if a small business is involved) and the Secretary of Labor, not the General Accounting Office.

DECISION

King Nutronics Corporation protests the award of a contract to Eaton Consolidated Controls (ECC), under request for proposals (RFP) No. N00421-88-R-0146, issued by the Navy for calibration equipment. This RFP is a resolicitation containing revised, less restrictive specifications, of RFP No. N00421-87-C-0166. King contends that ECC and its contractual sales agent, S&E Associates (S&E), attempted to circumvent the Walsh-Healey Act under the prior related procurement. Therefore, King asserts that ECC is not entitled to receive an award of a contract upon reprocurement, since both the offeror and its sales agent stand to benefit from performance of the contract in the same manner as if the original contract had been performed.

We dismiss the protest.

The original RFP included 6 portable pressure systems and 10 automatic pressure calibration systems. The description for the items was the King Nutronics Corporation's "brand name or equal." A contract for two line items was awarded to S&E on September 30, 1987, for equipment which was manufactured by ECC. King protested on the basis that the equipment proposed did not comply with the specified King Nutronics equipment's salient characteristics. King later withdrew this protest and a subsequent protest when the government suspended performance and eventually terminated S&E's contract. S&E informed the contracting agency that it did not plan to offer a proposal in response to the resolicitation which is at issue here, because their Walsh-Healey Act status as a "manufacturer" or a "regular dealer" had been challenged by King in litigation concerning an unrelated contract awarded by the San Antonio Air Logistics Center. ECC, the manufacturer which would have supplied the equipment under the original contract awarded to S&E, submitted a proposal in response to the resolicitation and was awarded the contract as the low cost, technically acceptable offeror.

Based on a deposition taken with respect to the litigation concerning S&E's Walsh-Healey Act status, King contends that with respect to an unrelated procurement, ECC approached S&E to qualify ECC's products and to submit an offer for a contract in S&E's name which, if awarded, would have been performed by ECC. In its protest, King states that it has no reason not to suspect that the same or similar procedures were followed in the procurement process which resulted in the award of the now terminated contract to S&E. Accordingly, King protests that ECC should be found ineligible for the current award.

In its proposal, ECC indicated that it had entered into a contingent fee arrangement and submitted a standard form (SF) 119 stating that it had entered into the arrangement with S&E for "follow up, customer support, technical consultations, applications engineering etc." The contracting officer reviewed the SF 119 and determined that there was no reasonable basis to conclude that S&E had exerted improper influence on contracting personnel, that the fee paid was reasonable, and that S&E had been involved in this type of work for an extended period of time. Based on these findings, the contracting officer concluded that S&E was a "bona fide agency" and, therefore, the contingent fee was permitted under the Federal Acquisition Regulation (FAR) § 3.408-2(c) (FAC 84-5). King has provided no basis to

suggest that this determination was improper and, therefore, we have no reason to question whether there is a bona fide agency. See Victory Corrugated Container Corp., B-230750, Apr. 25, 1988, 88-1 CPD ¶ 399.

In essence, King questions the contracting agency's affirmative determination of ECC's responsibility on the basis of alleged improprieties under the predecessor solicitation. First, as a general rule, allegations pertaining to the conduct of an offeror on a prior procurement are irrelevant because each procurement must stand on its propriety. Personnel Decisions Research Institute, 66 Comp. Gen. ____, B-225357.2, Mar. 10, 1987, 87-1 CPD ¶ 270. Moreover, King is actually arguing that ECC should be debarred or suspended from all government calibration equipment procurements because of its ongoing sales agency contract with S&E. However, an offeror can only be debarred or suspended from competing for government contracts for just cause through the specific procedures set forth in FAR § 9.406, et seq., which provide for procedural due process. No such procedures have been invoked or followed, and King is, in effect, calling for the de facto debarment of ECC which is legally impermissible. Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107. To the extent that King is simply arguing that ECC's alleged complicity in S&E's miscertification mandates rejection of ECC's offer under this RFP, King is questioning ECC's integrity, which is a matter of responsibility. See Interstate Equipment Sales, B-225701, Apr. 20, 1987, 87-1 CPD ¶ 427. The Navy determined that ECC was responsible and our Office will not review an agency's affirmative responsibility determination absent a showing of possible fraud or bad faith, or misapplication of definitive responsibility criteria, which is not present here. 4 C.F.R. § 21.3(m)(5) (1988); Nationwide Health Search, B-230130, May 13, 1988, 88-1 CPD ¶ 454.

Finally, King argues that S&E is not qualified as a manufacturer or regular dealer. Since S&E is not the current offeror it is irrelvent whether S&E qualifies as a manufacturer or regular dealer under the Walsh-Healey Act. Moreover, our Office does not consider whether an offeror so qualifies. By law, such matters are for the determination by the procuring agency, in the first instance, subject to

final review by the Small Business Administration (if a small business is involved), and by the Secretary of Labor. See 4 C.F.R. § 21.3(m)(9); General Motors Corp., B-228388, Oct. 23, 1987, 87-2 CPD ¶ 389.

The protest is dismissed.

Robert M. Strong
Associate General Counsel