Vickers

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: James McGraw, Inc.

File: B-236974.2

Date: January 24, 1990

DIGEST

Protest by third low offeror against awardee is dismissed as protester is not interested party next in line for award. Subsequent protest against second low offeror, filed more than 10 working days after basis of protest was known, is dismissed as untimely and therefore does not confer standing as interested party on protester.

DECISION

James McGraw, Inc., protests the award of a contract to Morgan Denver Sales Co., by the Air Force's Warner Robins Air Logistics Center, for 20 grinding machines and an optional quantity of up to 20 machines under request for proposals (RFP) No. FO9603-89-R-56166. McGraw contends that the machines offered by Morgan Denver violate the restriction on foreign machine tools and the Buy American Act.

We dismiss the protest.

The RFP required that the grinding machines be manufactured in the United States or Canada and provided that a machine shall be considered manufactured in the United States or Canada if it is actually manufactured in the United States or Canada and the cost of its components manufactured in the United States or Canada exceed 50 percent of the cost of all its components. See Department of Defense Federal Acquisition Regulation Supplement § 252.225-7023 (DAC 88-4). Consequently, at paragraph K-37 of the RFP, offerors were required to certify the percentage of foreign and domestic content of the machines offered. Award was to be made on the basis of low evaluated price.

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Three offers were received in response to the RFP. In its offer Morgan Denver, which submitted the low price, certified that its machines had 45 percent Taiwan content and 55 percent domestic content. Discount Machinery and Equipment, Inc./Samuals Machinery was the second low offeror and McGraw's offered the highest prices.

McGraw's original protest to our Office filed on October 17, 1989, only challenged the acceptability of Morgan Denver's proposal. The Air Force, in addition to arguing that the protest is without merit, maintains that our Office must dismiss the protest because even if it is sustained, McGraw, since it is not the next low offeror, would not be in line for award and therefore is not an interested party.

In its comments on the Air Force's report, McGraw for the first time protested that the second low offeror, Discount, is not an authorized distributor of the grinding machine it proposed and had submitted an unauthorized joint offer. McGraw contends it did not become aware it was the third low offeror until it received a copy of the proposal abstract on November 2.

We agree with the Air Force that McGraw is not an interested party and we dismiss the protest.

An interested party is an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. See 4 C.F.R. § 21.0(a). Generally, a party will not be deemed to have the necessary economic interest where there are other intervening offerors that would be in line for award if the awardee were eliminated from competition. Applied Sys. Corp.--Recon., B-234159.2, Mar. 28, 1989, 89-1 CPD ¶ 319.

While McGraw has now protested the proposal of Discount, this protest is untimely. As noted above, McGraw received the abstract of offers on November 2 and was at that time aware that Discount was the second low offeror. However, McGraw's protest was not filed with our Office until December 4. Under our Regulations, a protest must be filed within 10 working days of when the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). Further, where as here, a protester later supplements a timely protest with new and independent grounds of protest, the later raised allegations must independently satisfy the timeliness requirements of our Regulations. Golden Triangle Management Group, Inc., B-234790, July 10, 1989, 89-2 CPD ¶ 26. It is clear that McGraw's protest concerning

Discount's offer was filed more than 10 days after November 2; it is thus untimely and will not be considered.

As we will not consider McGraw's protest concerning Discount, McGraw is not an interested party to protest the Morgan Denver award since Discount remains next in line for award after Morgan Denver.

We point out that, in any event, the protest appears to be without merit. First, while the protester argues that many of the items listed as components are in fact accessories and should therefore not be included in the evaluation, we have held that, where the accessories are needed for the machine to meet the solicitation's requirements, it is reasonable to view such accessories as components in determining whether the machine is a domestic item. See, e.g., A&D Machinery Co., B-234711, June 15, 1989, 89-1 CPD ¶ 566.

Further, the protester states that Morgan Denver does not manufacture the machine at all but merely imports the complete unit. However, McGraw then lists numerous components which Morgan Denver allegedly purchases from subcontractors in the United States such as the electrical system, offset tailstock and drive pulleys. If that is so, presumably these domestic components are then assembled by Morgan Denver into the final unit for delivery. We have held that assembly of this type constitutes manufacturing for the purpose of the domestic source requirement. In this regard, manufacturing may consist of the assembly of components so that the completed item meets the needs of the Government as expressed in the solicitation. See Morey Machinery, Inc., B-233793, Apr. 18, 1989, 89-1 CPD ¶ 383.

Finally, the protester generally argues that the awardee's breakdown of domestic components is inflated because they are set forth at list price rather than actual wholesale cost. The protester does not state what the actual cost should be nor does it specify that listing these items at their alleged actual costs would result in the foreign content exceeding the domestic content. We therefore would have no basis upon which to object to the agency's reliance on the certification supplied by the awardee.

In short, Morgan Denver certified in its offer that it would furnish a domestic end product. Whether that firm complies with its certification is an issue of contract administration which is the responsibility of the Air Force to carefully monitor during contract performance. See The Pratt & Whitney Co, Inc., et al., B-232190, et al., Dec. 13, 1988, 88-2 CPD ¶ 588.

The protest is dismissed.

Ronald Berger
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