



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Moog Inc.
File: B-237749
Date: March 19, 1990

Deborah Norman-Lane, Esq., for the protester.
Arthur D. Smith, Texas Aerospace Services, Inc., for the interested party.
Edward J. Korte, Esq., Department of the Army, for the agency.
Peter A. Iannicelli, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office (GAO) will not review protest that government should procure services from particular firm on a sole-source basis, since the objective of GAO's bid protest function is to ensure full and open competition for government contracts.
2. Protest alleging impropriety in request for proposal's (RFP) evaluation scheme is untimely when filed after award because, under General Accounting Office's Bid Protest Regulations, protest alleging impropriety which is apparent on the face of the RFP must be filed prior to the deadline for receipt of initial proposals.
3. Protester's contention that its proposal should have been selected for award because it offered a warranty and updated technical configurations is denied where solicitation does not require warranty or most up-to-date configuration, and RFP does not list such items among evaluation factors; proposals must be evaluated only on the basis of factors specified in the solicitation.
4. General Accounting Office will not review an affirmative determination of responsibility by the contracting officer, absent a showing of possible fraud or bad faith on the part of the contracting agency or an alleged failure of the agency to apply definitive responsibility criteria.

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DECISION

Moog Inc. protests the award of a contract to Texas Aerospace Services, Inc. (TAS), pursuant to request for proposals (RFP) No. DAAJ09-89-D-0176, issued by the Army Aviation Systems Command (AVSCOM) for overhaul and maintenance of helicopter pitch trim actuator assemblies for the UH-60 helicopter. Moog argues that it is the only qualified offeror, that its proposal represents the "best value" to the government, and that its proposed total price is lower than TAS' proposed total price if all work items are considered. Moog also alleges that award was made to TAS without properly considering contractor qualifications.

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

Issued on June 14, 1989, the RFP solicited offers to maintain, overhaul and repair an indefinite quantity of pitch trim actuator assemblies over a 3-year period. The RFP set forth minimum and maximum quantities and indicated that the contract awarded would contain both fixed-priced and cost-reimbursable contract line items. The RFP represented the first time that these supplies and services were procured on a competitive basis. Moog, the original equipment manufacturer (OEM) of the pitch trim actuator assembly, had been awarded maintenance and overhaul contracts on a sole-source basis since September 30, 1987. In 1988, the Army developed and issued a detailed work requirement for overhaul and maintenance of the assemblies, and the present requirement was approved for unrestricted competitive acquisition.

The RFP stated that award would be made to the "responsive and responsible offeror whose proposal is evaluated at the lowest total cost to the Government" based upon the total of the firm, fixed prices for the maximum quantity of assemblies to be overhauled and maintained over the 3-year term (contract line item Nos. (CLINs) 0001AA, 1001AA and 2001AA). In addition to these CLINs, the RFP stated that award was to be based upon evaluation of three other factors, not at issue in this protest: (1) the cost of a product verification audit; (2) transportation costs; and (3) rental value of government-owned property proposed to be used by an offeror. Each contractor was also required to provide estimated costs, at CLINs 0002AA, 1002AA and 2002AA, for contractor-furnished parts and materials to perform the contract; however, because these CLINs were estimated cost-reimbursable items, their costs were not listed in the RFP as evaluation factors.

The RFP was issued to 13 firms, but only Moog and TAS submitted proposals by the August 1, 1989, closing date for receipt of initial proposals.

Initial proposals showed that TAS' prices were significantly lower than Moog's on the three fixed-price line items for maintenance and overhaul, CLINs 0001AA, 1001AA and 2001AA, as follows:

	<u>0001AA</u>	<u>1001AA</u>	<u>2001AA</u>
TAS	\$ 891	\$ 915	\$ 945
Moog	\$4,218	\$4,475	\$4,776

TAS also estimated a significantly higher cost than Moog for the cost-reimbursable line items for contractor-furnished parts other than mandatory parts used in overhauling assemblies, CLINs 0002AA, 1002AA and 2002AA, as follows:

	<u>0002AA</u>	<u>1002AA</u>	<u>2002AA</u>
TAS	\$3,872	\$3,980	\$4,100
Moog	\$ 458	\$ 487	\$ 522

Because of the significant disparity in prices and cost estimates between the TAS and Moog proposals, the contracting officer held discussions with each offeror, asked each to explain its cost estimates for the contractor-furnished parts line items, and asked TAS to consider the accuracy of its offer. The contracting officer suspected that TAS had either made a mistake in its offer or misunderstood the contractor-furnished parts requirement, because Moog's cost estimates for contractor-furnished parts were so much lower than TAS' and Moog had a history of performing the contract. Accordingly, TAS was told by the contracting officer that the agency was particularly concerned over whether TAS understood the contractor-furnished parts requirement.

During discussions, TAS responded that its proposed prices for the overhaul and maintenance line items were accurate and that they were based on TAS' 22 years of experience in making such estimates. TAS also replied that its cost estimates for contractor-furnished parts were high due to the high cost of certain parts, such as cylinders at \$5,607 each and frames at \$8,992 each. The contracting officer informed TAS that costs related to special tooling and test equipment would not be considered allowable costs under the cost-reimbursable line items of the contract; however, the contracting officer was satisfied that TAS understood the contractor-furnished parts requirement.

When best and final offers (BAFOs) were submitted, each contractor remained firm on its offered prices and cost estimates as initially proposed. TAS was determined to be the low offeror based upon the RFP's evaluation factors. The contracting officer then examined TAS and concluded that it was a responsible firm. Specifically, the record shows that the contracting officer considered the results of a recent pre-award survey of TAS conducted on August 30, 1989, in connection with another procurement. Among other things, that survey showed that TAS had completed 81 contracts over the past 12 months with a delinquency rate of only 0.03 percent. Furthermore, the contracting agency had obtained specific assurances from TAS that it either already had on hand or could procure or manufacture any special test equipment needed to perform the contract.

Upon determining that TAS was a responsible offeror, the Army awarded a contract to TAS on October 2, 1989. After being notified of the award on October 30, Moog protested to our Office on November 13.

Moog first contends that since it is the OEM and has been the sole-source contractor for maintenance/overhaul of the helicopter pitch trim actuator, the proper knowledge and equipment required for maintenance and overhaul of the units are not available at any other contractor's facility. In essence Moog is arguing it should remain the sole-source contractor for maintenance and overhaul of the assemblies by virtue of its OEM status and experience. In view of the objective of our bid protest function to ensure full and open competition for government contracts, as a general matter our Office does not consider it appropriate to review a protest that an agency should procure services from a particular firm on a sole-source basis. Marker-Modell Assocs., B-215049, May 25, 1984, 84-1 CPD ¶ 576. This is so even where the protester claims that its proprietary position as an OEM makes it the only firm qualified to do the work. Id. Accordingly, since the thrust of Moog's OEM/sole-source experience argument is to restrict competition to itself, we dismiss this aspect of the protest. See also Leslie Co., B-218632, Aug. 8, 1985, 85-2 CPD ¶ 149.

Moog next argues that a "truer comparison" of offers can be accomplished by including all the contract line items, rather than just those for overhaul and maintenance of the assemblies as set forth in the RFP. However, under our Bid Protest Regulations, a protest alleging an impropriety in a solicitation which is apparent prior to the closing date for receipt of initial proposals must be filed prior to closing.

4 C.F.R. § 21.2(a)(1) (1989). Here, the evaluation factors for award were clear from the face of the solicitation. The RFP expressly stated that award would be based on evaluation of the overhaul and maintenance line items along with several other cost factors that were listed in Section M's "evaluation factors for award"; the evaluation scheme did not list the cost-reimbursable, contractor-furnished parts/materials line items as evaluation factors. Accordingly, Moog should have protested AVSCOM's evaluation scheme prior to the deadline for receipt of initial proposals (August 1, 1989). As Moog did not protest until after the contract had been awarded to TAS, the protest is untimely to the extent that it challenges the RFP's evaluation criteria as deficient. See Raven Servs. Corp., B-231639, Aug. 23, 1988, 88-2 CPD ¶ 173.

Moog also charges that it should have been awarded the contract under the evaluation criteria set out in the RFP. Moog contends that the agency erred in its evaluation of Moog's offer, because the agency failed to give proper consideration to the added technical benefits of a full 1-year warranty and updated assembly configurations, which Moog states it offered. Because of these extra technical benefits, Moog argues that its offer is technically superior to the TAS proposal and represents the best value to the government.

While Moog asserts that its offer is technically better because of its provision for a 1-year warranty and updated assembly configurations, the RFP contains no requirement for either of these items. Since an agency must evaluate proposals only on the basis of the factors and requirements specified in the solicitation, the agency properly did not consider those alleged benefits of Moog's offer in evaluating proposals for award.^{1/} Ingersoll-Rand Co., B-224706, B-224849, Dec. 22, 1986, 86-2 CPD ¶ 701.

Moog also contends that TAS is not qualified to perform the work required in the RFP. Moog maintains that "TAS has no experience with hydraulic or mechanical actuation systems" and that TAS has never "been trained or authorized by Moog" to perform the UH-60 pitch trim actuator maintenance and overhaul. In particular, Moog complains that the contracting officer did not have a pre-award survey conducted on TAS for this procurement and did not examine

^{1/} In this regard, TAS also has asserted that its products come with a standing, unwritten warranty.

financial reports (for example, Moog cites a Dun & Bradstreet report) that were available to the contracting officer before determining TAS to be responsible.

Where, as here, matters concerning an offeror's capability to perform are not set forth in the RFP as evaluation factors, they concern responsibility, not technical acceptability. Leslie Controls, Inc., B-229813, Apr. 7, 1988, 88-1 CPD ¶ 349. Since the determination of a prospective contractor's responsibility involves a wide degree of discretion and business judgment, our Office will not review an agency's affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of the contracting agency or an alleged failure of the agency to apply definitive responsibility criteria. Diversified Computer Consultants, B-230313; B-230313.2, July 5, 1988, 88-2 CPD ¶ 5. Definitive responsibility criteria are specific objective standards established by an agency to measure an offeror's ability to perform the contract. Motorola, Inc., B-234773, July 12, 1989, 89-2 CPD ¶ 39.

The present solicitation contains no definitive responsibility criteria. Rather, the RFP simply requires the contractor to maintain and overhaul UH-60 pitch trim actuator assemblies and contains a detailed set of specifications regarding how the work is to be accomplished. Such specifications are performance requirements rather than definitive responsibility criteria, since they concern actual contract performance, not the contractor's ability to perform. Leslie Controls, Inc., B-229813, supra. The ability to meet these standards therefore is encompassed by the contracting officer's subjective responsibility determination. Id.

As there were no definitive responsibility criteria in the RFP, and because Moog has made no showing of fraud or bad faith on the part of contracting officials, we see no basis to review the contracting officer's determination that Moog was responsible.

Finally, because of the discrepancy between TAS' low price on the overhaul and maintenance line items and its high price on the contractor-furnished parts line items, Moog argues that TAS has "incorrectly interpreted" the solicitation requirements and misallocated some of its overhaul and maintenance costs to the contractor-furnished parts estimates. However, as noted earlier, this issue was raised with TAS during discussions, and TAS satisfied the contracting officer that it understood the requirements. TAS also explained, to the contracting officer's

satisfaction, that its high estimated cost for contractor-furnished parts was justified. In any event, the agency points out that contractor-furnished parts are cost-reimbursement line items that must be certified by the contractor, and the contract provides for disallowing claims for reimbursement when the contracting officer determines the costs are not allowable under the contract terms. Thus, costs for acquiring equipment to perform the overhaul and maintenance line items cannot be shifted to the cost-reimbursable line items, as the protester suggests.

The protest is dismissed in part and denied in part.

for 
James F. Hinchman
General Counsel