



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Electrodynamics Corporation

File: B-238100

Date: April 17, 1990

George Lindberg, for the protester.

Barry M. Sax, Esq., Defense Logistics Agency, for the agency.

Linda C. Glass, Esq.; Andrew T. Pogany, Esq.; and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where low bidder unequivocally offered to perform the contract and took no exception to the terms of the invitation for bid's technical specifications, the firm's bid was responsive.
2. Where contracting officer determined the prospective awardee to be a responsible contractor based on a preaward survey finding that the firm had adequate financial resources and an adequate production capability to manufacture the required product in accordance with the purchase description, and where there is no showing that this determination was made in bad faith, there is no basis to object to the agency's affirmative determination of the prospective awardee's responsibility.

DECISION

General Electrodynamics Corporation (GEC) protests the award of a contract to West Weigh/Western Scale Company (West Weigh) under invitation for bids (IFB) No. DLA400-89-B-4185, issued by the Defense General Supply Center, Defense Logistics Agency, for portable weighing devices used for weighing military vehicles and cargo in remote areas. GEC argues that the bid of West Weigh was nonresponsive because it alleges that the product West Weigh intends to supply does not comply with several specifications as described in the purchase description contained in the IFB. GEC also argues that West Weigh was improperly awarded the contract as a result of a preaward survey rather than through a

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technical evaluation, and the contracting officer acted in bad faith.

We deny the protest.

The IFB included a purchase description with specifications requiring, among other things, that the scale be waterproof, dustproof and have a machined anti-skid platform and an external zero adjustment control knob. The IFB did not require the submission of commercial descriptive literature. The IFB also provided for first article testing of the product. At bid opening on August 29, 1989, the agency received four bids, one of which was rejected as not being responsive to the purchase description. Of the remaining bidders, West Weigh was the apparent low bidder; its bid took no exception to the IFB's specifications.

The contracting officer requested a preaward survey of West Weigh to determine the capability of West Weigh to meet the requirements of the contract. Prior to the survey being conducted, GEC filed an agency-level protest challenging any proposed award to West Weigh on the ground that West Weigh's product, as described in commercial literature, did not meet the technical specification described in the purchase description. The contracting officer notified the preaward survey team of GEC's protest and requested that the survey team address the points raised by GEC. The survey team found that West Weigh could meet the specifications, found West Weigh to be a responsible contractor and recommended a complete award to West Weigh. On December 11, the agency made award to West Weigh as the low, responsible, responsive bidder.

The protester alleges that based on available current commercial literature describing the West Weigh product, it does not comply with the IFB purchase description. Specifically, GEC alleges that West Weigh's product does not comply with the purchase description for the following six technical requirements for the scale: (1) external zero adjustment control knob; (2) waterproofing and dustproofing and a machined anti-skid platform; (3) individual readout with an accuracy of plus/minus 1 percent; (4) accuracy test; (5) readout range from 0 to 20,000 pounds with major and minor gradations of 100 pound and 20 pound intervals, respectively; and (6) capability of weighing a 2-1/2 ton truck in sandy soil without additional base support.

The agency responds that in submitting its response to the IFB, West Weigh made an unequivocal offer to furnish the required scale, and the firm is therefore obligated to comply with all solicitation requirements. In addition, the

agency points out that the preaward survey team reviewed the six allegations raised by the protester and concluded that West Weigh was in fact capable of delivering a scale in compliance with the IFB purchase description.

We have reviewed the bid submitted by West Weigh and conclude that it is responsive to the terms of the IFB. The solicitation did not require the submission of descriptive literature, and West Weigh did not submit any. Rather, West Weigh has made an unequivocal offer to supply the requisite number of scales in accordance with the purchase description. Thus, West Weigh has legally obliged itself to supply the scales in exact accordance with the IFB's specifications, and whether it will in fact be able to supply conforming goods is a matter of the firm's responsibility. Can-Am Indus., Inc., B-235922, Oct. 17, 1989, 89-2 CPD ¶ 361. We note that West Weigh will apparently supply a partially newly designed scale that is different from its standard commercial scale on which the protest is based.

GEC also questions the award on the ground that it allegedly resulted from a preaward survey rather than through a technical evaluation.^{1/} GEC contends that the contracting officer made the award in bad faith and did not act in the best interest of the government.

The Competition in Contracting Act of 1984 (CICA) requires agencies to evaluate sealed bids based solely on the factors specified in the solicitation and to award a contract to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and other price-related factors included in the solicitation. 10 U.S.C. § 2305(b)(1) and (3) (1988). Here, the only evaluation factor included in the solicitation was lowest overall cost to the government. Since, as previously stated, West Weigh made an unequivocal offer to deliver scales in compliance with the specifications at the lowest price, absent a nonresponsibility determination, the agency's failure to award to West Weigh would violate CICA. Further, a technical evaluation of the awardee's product, to

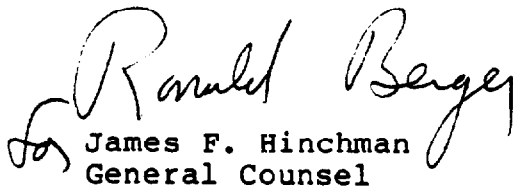
^{1/} In response to the agency report, GEC apparently also protests the agency's decision to conduct the procurement on a sealed bid basis. To the extent the protester argues that this should have been a negotiated procurement, its protest is untimely. Protests of apparent alleged solicitation defects must be protested prior to bid opening, and here GEC did not protest until after award. See 4 C.F.R. § 21.2(a)(1) (1989).

determine responsiveness, would have been contrary to the terms of the IFB.

As to the allegation of bad faith, prior to award an agency is required to make an affirmative determination of the prospective awardee's responsibility, Federal Acquisition Regulation (FAR) § 9.103(b) (FAC 84-18), which we will not question absent a showing of fraud or bad faith on the part of procurement officials. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5).

We find no showing of bad faith here. The record shows that the affirmative determination of West Weigh's responsibility was made on the basis of a preaward survey that found West Weigh to have satisfactory financial resources and satisfactory production capability to manufacture the required scales. Further, the survey team, at the contracting officer's request, specifically evaluated West Weigh's ability to furnish a scale conforming to the technical specifications. The contracting officer reasonably relied on the survey team's findings that the awardee was a responsible prospective contractor.

The protest is denied.


James F. Hinchman
General Counsel