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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Diemaco, Inc.

File: B-246065

Date: October 31, 1991

Richard L. Moorhouse, Esq., Dunnells, Duvall & Porter, for the protester.
Al Weed, Esq., for Nomura Enterprise Inc., an interested party.
Craig E. Hodge, Esq., and Piper L. Fuhr, Esq., Department of the Army, for the agency.
John W. Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Since the evaluation of proposals must be in accordance with the solicitation's evaluation provisions, agency was required to apply evaluation preference for small disadvantaged businesses (SDB) without exception for qualifying country offers since the SDB evaluation preference clause in the solicitation did not include an exception for qualifying country offers.

DECISION

Diemaco, Inc.[1] protests the award of a contract to Nomura Enterprise Inc. under request for proposals (RFP) No. DAAA09-89-R-1469, issued by the Army for gun barrel assemblies.

We dismiss the protest.

When it was issued on October 3, 1989, the RFP included a superceded version of Department of Defense (DOD) Federal Acquisition Regulation Supplement (DFARS) clause 252.219-7007, dated November 1988. That clause required the contracting agency to add a factor of 10 percent to offers from

[1]Diemaco is a Canadian corporation and pursuant to applicable regulations, the Canadian Commercial Corporation (CCC) is the actual offeror. When CCC is awarded a contract, it subcontracts 100 percent of the contract to a Canadian corporation, such as Diemaco. The protest was filed on behalf of CCC and Diemaco. For purposes of simplicity, we refer to Diemaco as the protester.

concerns that are not small disadvantaged businesses (SDB). The current version of the clause, which was effective on September 28, 1989, before the RFP was issued, provides that a contracting agency shall not impose the 10-percent SDB evaluation preference to the price of a non-SDB firm offering the product of a "qualifying country," as defined in the regulations or if the imposition of the SDB factor would be inconsistent with a memorandum of understanding or other international agreement with a foreign government. DFARS § 252.219-7007(b)(2). The earlier version of the clause, which was included in the solicitation, did not include these exceptions to the SDB preference.

Based on the proposals submitted in response to the solicitation, Diemaco was the low priced offeror. However, since Nomura is an SDB and Diemaco is not, the contracting agency added a 10-percent evaluation factor to Diemaco's offer, pursuant to the earlier version of the DFARS § 252.219-7007 clause, included in the solicitation. After the evaluation preference was applied, Nomura was the low priced offeror and the Army awarded it the contract.

Diemaco argues that as a Canadian company its offer should be considered a "qualifying country offer" under the current version of DFARS § 252.219-7007, and that in accordance with that regulation, the application of the 10-percent evaluation factor to Diemaco's offer is prohibited by an agreement between the United States and Canada. According to Diemaco, although the earlier version of the clause included in the solicitation did not provide these exceptions to the SDB preference for qualifying countries, the later version of the regulation, which does provide these exceptions, was in effect when the solicitation was issued and had been in effect for 2 years at the time proposals were submitted and therefore should have controlled proposal evaluation.

The longstanding rule is that the evaluation of offers must be in accordance with the solicitation's evaluation provisions. Cherokee Elecs. Corp., B-240659, Dec. 10, 1990, 90-2 CPD ¶ 467; Basic Supply Co., Inc., B-239267, June 1, 1990, 90-1 CPD ¶ 522. Here, since the solicitation included the DFARS clause requiring an evaluation preference for SDBs and did not include exceptions to that preference for qualifying countries or for international agreements, the agency had no choice but to apply the evaluation preference to the offers of non-SDBs in accordance with the solicitation.[2]

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[2]Diemaco argues that the current version of DFARS § 252.219-7007 is a statutory procurement regulation and, therefore, it should be incorporated into the solicitation by operation of the "Christian doctrine." See G.L. Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963).

Here, since the solicitation clearly advised offers that the agency did not intend to apply the qualifying country exception in the evaluation of offers, to the extent that Diemaco disagreed with that approach it was obligated to express that disagreement before submitting its proposal. In this respect, our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), as amended by 56 Fed. Reg. 3759 (1991), provide that a protest based upon an alleged impropriety in a solicitation must be filed prior to the time set for receipt of initial proposals to enable the contracting agency or our Office to take corrective action, if the circumstances warrant, while it is most practicable. Basic Supply Co., Inc., supra.

The protest is dismissed.

John Brosnan
Assistant General Counsel

We do not agree. The "Christian doctrine" is limited to incorporation of mandatory contract clauses into an otherwise validly awarded government contract and does not stand for the proposition that mandatory provisions may or should be incorporated into a solicitation. Mosler Sys. Div., Am. Standard Co., B-204316, Mar. 23, 1982, 82-1 CPD ¶ 273.