



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

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Decision

Matter of: Hughes Georgia, Inc.
File: B-244936; B-244936.2
Date: November 13, 1991

John S. Pachter, Esq., Michael K. Love, Esq., John V. Snyder, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for the protester.
Kenneth S. Kramer, Esq., and James M. Weitzel, Jr., Esq., Fried, Frank, Harris, Shriver & Jacobson, for Raytheon Company, an interested party.
Gregory H. Petkoff, Esq., and Charles M. Klein, Esq., Department of the Air Force, for the agency.
Aldo A. Benejam, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. List of potential subcontractors submitted in response to solicitation provision requesting bidders to submit list of suppliers requiring Equal Employment Opportunity (EEO) preaward clearance, relates to bidders' responsibility, where that information was submitted only to assist the contracting agency in administering its EEO program; information was not necessary to determine whether bidder unequivocally offered to deliver items in accordance with the material terms of solicitation, and list of potential subcontractors may be submitted at any time prior to award.
2. Protest that contracting agency improperly awarded a contract with the intention of materially modifying it after award by adding two new approved suppliers to source control drawings which were not listed on drawings issued with solicitation is denied, where protester was not prejudiced by agency's actions since even if protester could have relied on quotes obtained from new sources in preparing its bid, protester has failed to show that it would have possibly displaced the low bidder.

DECISION

Hughes Georgia, Inc. protests the award of a contract to Raytheon Company, Missile Systems Division, under invitation for bids (IFB) No. F33657-91-B-0044, issued by the Department of the Air Force for 5,255 AGM-65G and 36 AGM-65F Maverick missiles, and 79 spare guidance control sections. Hughes argues that Raytheon's bid should have been rejected

as nonresponsive. In a subsequently filed second protest, Hughes argues that the Air Force improperly made award to Raytheon with the intention of materially modifying the contract after award.

We deny the protests.

BACKGROUND

Between 1978 and 1982, the Air Force procured various quantities of the Maverick missile solely from Hughes. In 1983, the Air Force awarded a second source contract to Raytheon for 500 missiles, and in 1987 and in 1989, the agency conducted competitive negotiated procurements, which resulted in split awards to Hughes and Raytheon for the production of additional missiles. In 1990, following a competitive negotiated procurement, the Air Force awarded a contract to Hughes to produce additional missiles. The Air Force states that Hughes's 1990 contract was the last planned production contract for the missiles. The agency issued the instant IFB to replace missiles expended during Operation Desert Storm.

In addition to producing the Maverick missile, Hughes is also responsible for Weapon System Support (WSS) under a separate contract. As the WSS contractor, Hughes manages and maintains technical drawings and specifications of the Maverick missile, which includes a listing of approved sources which supply materials or components used in the production of the missiles. These drawings, referred to as "source control drawings," are part of the configuration identification baseline (CIB) of the missiles.¹

The agency issued the IFB on June 11, contemplating the award of a firm, fixed-price contract for the missiles and spare guidance control sections. Attachment No. 8 to the IFB was the CIB for the required items, which included the source control drawings for the missiles. Bidders were required to submit unit and extended bid prices for each of three contract line items (CLIN): CLIN 0001, the AGM-65G

¹The CIB essentially consists of performance-oriented specifications. Military Standard (MIL-STD) 480B dated July 15, 1988, entitled "Configuration Control--Engineering Changes, Deviations and Waivers," implements the configuration control requirements of the Department of Defense. MIL-STD 480B defines a "baseline" as a document or a set of documents "formally designated by the government at a specific time during [an item's] life cycle. Baselines plus approved changes from those baselines constitute the current approved configuration identification" for the required items.

missiles; CLIN 0002, the AGM-65F missiles; and CLIN 0004, the spare guidance control sections. Award was to be made to the bidder submitting the lowest total extended bid price.

At the July 11 bid opening, Raytheon submitted the low bid (\$264,799,879); Hughes's bid (\$269,974,671) was the only other bid received by the agency. Following bid opening, both bidders were permitted to review each other's bid schedule, and on July 16, with one exception noted below, the agency permitted the protester to review Raytheon's bid in its entirety. The contracting officer awarded the contract to Raytheon on July 17. Hughes protested the award to our Office on July 25. On July 30, in accordance with Federal Acquisition Regulation (FAR) § 52.233-2, the contracting officer issued a stop-work order directing Raytheon to stop contract performance.

Hughes argues that the Air Force should have rejected Raytheon's bid as nonresponsive because in a list of subcontractors furnished with its bid, Raytheon submitted the names of two firms which were not listed as approved sources of supply on the source control drawings included in the CIB issued with the IFB. Hughes also alleges that prior to award, the agency had improperly decided to add the two new suppliers that Raytheon submitted with its bid to the source control drawings after award. According to Hughes, the contract thus awarded to Raytheon is materially different from that advertised in the IFB.

ANALYSIS

Responsiveness of Raytheon's Bid

Section L-854 of the IFB, entitled "Equal Opportunity Preaward List of Subcontractors," stated in full:

"The prime contractor shall provide the list of subcontractors who meet the criteria of FAR § 52.222-28 with bid.^[2] Submission of the

²FAR § 52.222-28 is the "Equal Opportunity Preaward Clearance of Subcontracts" clause and states in full:

"Notwithstanding the clause of this contract entitled 'Subcontracts,' the Contractor shall not enter into a first-tier subcontract for an estimated or actual amount of \$1 million or more without obtaining in writing from the Contracting Officer a clearance that the proposed subcontractor is in compliance with equal

[Equal Employment Opportunity (EEO)] clearance for these subcontractors is desirable but not mandatory to expedite contract award. An award to a subcontractor cannot be made without the contracting officer's approval of the subcontractor's clearance."

In response to this provision, Raytheon submitted with its bid a document entitled "List of vendors over \$1 [million] requiring EEO clearances" (the EEO list).³ Among the firms listed, Raytheon included Aeroflex International and Cinch Cylindrical Division.

According to Hughes, Aeroflex is the only firm on Raytheon's EEO list that supplies the "torquer assembly," and Cinch the only firm that supplies the "umbilical connector," two source-controlled components of the required missiles. Hughes argues that since neither Aeroflex nor Cinch are listed as approved sources of supply on the source control drawings issued with the IFB, and since bidders were not authorized to use any other suppliers except those listed as approved sources on the drawings, Raytheon's listing of Aeroflex and Cinch demonstrated the firm's intent to provide items that deviate from the CIB. Hughes thus concludes that the Air Force should have rejected Raytheon's bid as nonresponsive.

The agency and Raytheon essentially argue that the information sought by clause L-854 concerns bidders' responsibility, and that the EEO list Raytheon submitted in response to that clause in no way affected the responsiveness of Raytheon's bid. In this connection, the agency states that the information sought by section L-854 is simply used by the Air Force to administer its EEO program. See generally FAR subpart 22.8. The agency explains that by requesting a list of potential subcontractors requiring EEO preaward clearance, the agency can expedite the required compliance check with the Department of Labor, see FAR § 22.805(a)(5), without unduly delaying award of a prime contract.

The test for responsiveness is whether a bid as submitted represents an unconditional offer that will bind the

opportunity requirements and therefore is eligible for award."

³Raytheon placed the legend "COMPETITION SENSITIVE-PROPRIETARY" across the top margin of the two pages of its EEO list. On July 16, Raytheon authorized the public release of the list and the deletion of the restrictive legend. The list was telecopied to Hughes on July 17.

contractor upon acceptance to perform the exact thing solicited in accordance with all the terms of the IFB, Seaward Corp., B-237107.2, June 13, 1990, 90-1 CPD ¶ 552. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the IFB, the bid is responsive. Mobility Sys. and Equip. Co., B-243332, Apr. 25, 1991, 91-1 CPD ¶ 412. Here, we find that nothing on the face of Raytheon's bid limited, reduced or modified its obligation to deliver items in accordance with the terms of the IFB, including the CIB's requirement to obtain components and materials from only approved sources.

Section H-017 of the IFB and the Statement of Work (SOW) require the successful contractor to comply with the requirements of the CIB, including the source control drawings.⁴ The source control drawings for the torquer assembly and the connector contained the following notation requiring the use of only approved sources of supply:⁵

"Only the item described on this drawing when procured from the vendor(s) listed hereon is approved by [Hughes] for the use in the application(s) specified hereon. A substitute item shall not be used without prior approval by [Hughes] or by the [Air Force]."

Our review of Raytheon's bid shows that the firm took no exception to this requirement, nor to any other term in the IFB. Contrary to Hughes's suggestion, the information requested by section L-854 of the IFB was not equivalent to a requirement for the submission of a "binding" vendor's list. Rather, since the information requested by that clause was to be used in administering the agency's EEO

⁴Section H-017 of the IFB, titled "Configuration Identification Baselines," stated in part that the "[c]ontractor shall comply with the requirement described in ATCH NR 8--[the CIB]--attached hereto," and referred to paragraph 3.1 of the SOW. That portion of the SOW states in pertinent part that "[t]he contractor shall provide . . . the AGM-65F and the AGM-65G Maverick missiles, and spare [guidance control sections] in accordance with the [CIB] specified in [section H-017]."

⁵Drawing No. 260036, labeled "Torquer Assembly, Guidance Unit," lists two different approved suppliers, neither of which is Aeroflex. Drawing No. 252883, labeled "Connector, Electrical--Umbilical Receptacle," lists only Hughes Aircraft Company as the approved source.

program, it bears on the bidders' responsibility,⁶ something that Hughes has not challenged, and was not related to bid responsiveness. See A&C Bldg. and Indus. Maint. Corp., B-218035, Feb. 13, 1985, 85-1 CPD ¶ 195; Allis-Chalmers Corp., B-179959, Jan. 21, 1974, 74-1 CPD ¶ 19.⁷

Raytheon's EEO list did not qualify or alter the CIB requirements, and in no way affected or modified the government's contractual right to receive items that comply with the CIB--i.e., items that only incorporate components provided by approved sources listed on the source-controlled drawings. Consequently, Raytheon's inclusion of Aeroflex and Cinch in response to the information requested by section L-854 did not render Raytheon's bid nonresponsive. See, e.g., Coastal Indus., Inc., B-230226.2, June 7, 1988, 88-1 CPD ¶ 538; Dubicki & Clarke, Inc., B-190540, Feb. 15, 1978, 78-1 CPD ¶ 132. Since Raytheon's EEO list did not affect or modify any of the terms of the IFB, the Air Force could not have properly rejected Raytheon's low bid as nonresponsive solely because the list contained the names of firms which were not listed as approved sources on the source control drawings.

⁶Although clause L-854 states that bidders "shall" provide the EEO list with their bid, it is clear from the precatory language in the second sentence of the clause, making submission of the list "desirable but not mandatory," that the agency could not have properly rejected a bid as nonresponsive solely because it failed to include the EEO list. See, e.g., Aviation Specialists, Inc.; Aviation Enters., Inc., B-218597; B-218597.2, Aug. 15, 1985, 85-2 CPD ¶ 174 (a contracting agency cannot change a matter of responsibility into one of responsiveness merely by the terms of IFB).

⁷To the extent that Hughes argues that the legend Raytheon authorized deleted from its EEO list, improperly restricted public inspection of the allegedly "unapproved" nature of the items Raytheon offered, nothing on Raytheon's EEO list directly impacted on the nature, price, quantity, or quality of the items offered. See Ace Fed. Reporters, Inc., B-222584, June 30, 1986, 86-2 CPD ¶ 18, aff'd, B-222584.2, Oct. 11, 1986, 86-2 CPD ¶ 432. In any event, Raytheon authorized the agency to delete the restrictive legend and Hughes was not deprived of the opportunity to inspect the list.

Hughes relies on several decisions of our Office⁸ to argue that where an IFB identifies previously approved source-controlled components and requires bidders to certify that it will furnish only those components, failure to certify requires rejection of the bid as nonresponsive. Each of those cases, however, concerned IFBs which contained a requirement that bidders "certify" that they would furnish components from approved suppliers listed on the source control drawings, and cautioned bidders that failure to do so would result in rejection of their bids.⁹ The IFB here simply contained no such certification requirement. This aspect of Hughes's protest is denied.

Modifications to Raytheon's Contract

In its second protest, Hughes contends that the contracting officer had improperly decided before award to modify Raytheon's contract by adding Aeroflex and Cinch as approved sources to the source control drawings after award. Hughes states that the Air Force made it clear during a bidders' conference that the IFB "froze" the CIB as of August 21, 1989, for bidding purposes. Hughes states that in preparing its bid, it followed the agency's instructions and based its bid on providing items that conformed to approved changes made to the CIB as of that date. Hughes primarily relies on an August 16, 1991, Air Force document that Hughes received with the agency's response to Hughes's initial protest, which stated that "the government has approved both [Aeroflex and Cinch] as sources of supply"; and a September 16 Air Force letter instructing Hughes under its WSS contract to "add Aeroflex to source control drawing for torquer assembly guidance unit."

The agency explains that as with most major weapon systems, the Maverick program is dynamic and ever-changing, with multiple contracts being performed simultaneously. To keep systems current, the Air Force has an established process

⁸For example, the protester cites Fraser-Volpe Corp., B-213910, Dec. 28, 1983, 84-1 CPD ¶ 35; and Phaostrom Instrument & Elec. Co., Inc., B-214169, Apr. 24, 1984, 84-1 CPD ¶ 474.

⁹Typically, the certification consisted of checking a box next to the statement "[t]he item/component(s) being offered will be obtained from only the approved source(s) identified on the source control drawing(s)." See, e.g., MVI Precision Machining, Ltd., B-210730, Sept. 27, 1983, 83-2 CPD ¶ 382. Such certification was intended to prevent bid shopping--seeking after award lower-priced suppliers or subcontractors than those originally considered in the formulation of the prime contractor's bid.

whereby new engineering or design changes are incorporated into weapon systems through "engineering change proposals" (ECP) submitted by contractors,¹⁰ and approved by the agency. ECPs allow for cost savings, improvements, and integration of the Maverick missile with other weapon systems. Approved ECPs are ultimately incorporated into the relevant technical drawings, including ECPs to add newly approved sources to the source control drawings.

The record shows that on September 7, 1990, Raytheon, under its 1989 contract, submitted a Class II ECP to add Cinch as an approved source to the source control drawing for the umbilical connector. The agency states that although Hughes challenged that ECP, Cinch was approved as a source of supply after August 21, 1989. On June 20, 1991, also under its 1989 contract, Raytheon submitted an ECP to add Aeroflex as an approved supplier to the source control drawing for the torquer assembly. On June 26, prior to the July 11 bid opening, the agency's CCB approved that change as a Class I ECP. In a July 5 letter which references Raytheon's 1989 contract and its ECP to add Aeroflex, the Air Force notified Raytheon that the "ECP was considered by the [CCB] and is approved for technical content only. This is not authorization to proceed. A formal modification will be required to incorporate this ECP into [Raytheon's 1989] contract." The contracting officer had not effected that modification to Raytheon's 1989 contract by bid opening.

In a June 24 letter to the Air Force that referenced Raytheon's ECPs to add Cinch and Aeroflex as approved sources, Hughes specifically referenced the IFB and stated in part:

"[Hughes] has now determined that these two changes may affect our bid [under the IFB]. If the new vendors are qualified, we may solicit quotations from them . . . It is requested that this qualification data be provided to [Hughes] at your earliest convenience, but within a timeframe

¹⁰ECPs are classified as either Class I or Class II. Class I ECPs involve changes that impact form, fit, function, or critical items/vendors to be included in source control drawings. Class I ECPs must be approved by the agency's Configuration Control Board (CCB) and require a contract modification before they are incorporated into the relevant source control drawings. Class II ECPs involve minor changes and are approved by the Administrative Contracting Officer. All approved ECPs are periodically processed by Hughes under its WSS contract for inclusion in the drawings.

which will allow us to solicit quotations should that action be appropriate."

The Air Force responded to Hughes in a June 26 letter stating that the data required to add Aeroflex was "reviewed by [the agency], and the Aeroflex Torquer is considered qualified by our engineering staff."

Hughes concedes that ECPs have been authorized that incorporate changes to Hughes's and Raytheon's 1989 and 1990 production contracts, but argues that those ECPs did not affect the CIB issued with the IFB, which was "frozen" as of August 21, 1989. Hughes argues that notwithstanding the "dynamic" and "ever-changing" nature of the Maverick program, the restrictions imposed by sealed bidding procedures precluded the agency from effecting any changes to the CIB issued with the IFB, except by amendments as required by FAR § 14.208. Hughes maintains that the Air Force's June 26 letter, did not amend the IFB to add Aeroflex and Cinch as approved sources to the source control drawings. Accordingly, Hughes alleges that the agency's preaward decision to add those sources to the CIB issued with the IFB, amounts to an improper award with the intent to modify Raytheon's contract after award.

Prejudice is an essential element of a viable protest, and where no prejudice is shown, or is otherwise evident, our Office will not disturb an award, even if some technical deficiency in the award process arguably may have occurred. American Mut. Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65. Here, even assuming that the Air Force gave Hughes insufficient notice prior to bid opening that Aeroflex and Cinch were approved sources of supply upon which Hughes could rely to prepare its bid, and that the Air Force now intends to add those two sources to the CIB under Raytheon's contract, the record does not show that Hughes was even possibly prejudiced as a result.

The protester's generalized statement that it could have submitted a substantially lower bid had it known prior to bid opening that Aeroflex and Cinch were approved sources is unsupported by the record. Despite our Office's specific requests, Hughes has provided no evidence to show what impact, if any, using Aeroflex would have had on its bid. As for Cinch, even assuming that Hughes--an approved source for the connector--were to obtain that component from Cinch, Hughes estimates that the reduction on its bid would be less than \$100,000--an insufficient amount to displace Raytheon as the low bidder.

Raytheon, on the other hand, has provided our Office the actual quotes it obtained from Aeroflex, as well as from the other two sources of supply listed on the source control

drawing for the torquer assembly. Raytheon also provided the quotes it obtained from Hughes and Cinch for the connector.¹¹ That information reveals that the difference between the Aeroflex quote for the torquer assembly and the next low quote for that component, when added to the difference between the Hughes and Cinch quotes for the connector, does not exceed one-fifth of the difference between Hughes's and Raytheon's bid. Accordingly, even if Hughes had been afforded an opportunity to rely on similar quotes from Aeroflex and Cinch to prepare its bid, Hughes has not shown that it possibly could have, or would have, displaced Raytheon as the low bidder. See, e.g., Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401.

Hughes also argues that price is not the only factor we should consider in determining materiality,¹² that the addition of Aeroflex and Cinch will alter Raytheon's legal obligations; and that the additions will improperly change the conditions under which performance will occur. Hughes has not explained, however, and we fail to see how the addition of two new suppliers will change Raytheon's legal obligations under the IFB, nor how having access to two new sources of supply will significantly affect the conditions under which Raytheon will perform the contract. We also deny this ground of Hughes's protest.

CONCLUSION

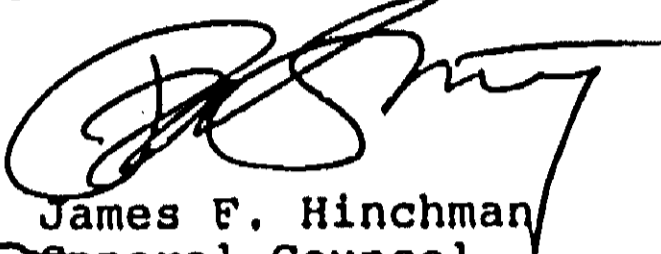
Since nothing in Raytheon's EEO list restricted, limited, or conflicted with any material requirement of the IFB, the Air Force could not have properly rejected Raytheon's low bid as nonresponsive, solely because the list contained the names of two firms--Aeroflex and Cinch--which were not listed as approved sources on the source control drawings. The mere fact that Aeroflex and Cinch were

¹¹This information was provided to counsel for Hughes under an amended protective order issued under our Regulations. See 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(d)(4)). Due to the nature of that information, it is briefly discussed only in most general terms.

¹²For example, Hughes cites Schlumberger Indus., B-232608, Dec. 27, 1988, 88-2 CPD ¶ 626 and Atlas Trading and Supply Co., Inc., B-227164, Aug. 10, 1987, 87-2 CPD ¶ 146 (bids that did not comply with IFBs terms and conditions were properly rejected as nonresponsive); Data Copy Supply, Inc., B-229585, Mar. 16, 1988, 88-1 CPD ¶ 270, and Vertiflite Air Servs., Inc., B-221668, Mar. 19, 1986, 86-1 CPD ¶ 272 (failure to acknowledge material amendments to IFBs rendered bids nonresponsive).

technically approved by the cognizant authority prior to bid opening and that the agency intends to add those firms as approved sources to the source control drawings after award, does not provide a sustainable basis for protest, where the protester has not shown that it was possibly prejudiced by the agency's actions. Even assuming that Hughes did not receive adequate notice of the technical approval prior to submitting its bid, the protester has failed to show that it could have possibly displaced Raytheon as the low bidder had Hughes been afforded an opportunity to base its bid on quotes obtained from Aeroflex and Cinch.

The protests are denied.



James F. Hinchman
General Counsel