

Comptroller General
of the United States

Washington, D.C. 20548

Curcio

146197

Decision

Matter of: Blue Tee Corporation

File: B-246623

Date: March 18, 1992

William M. Kelly for the protester,
Mary S. Byers, Esq., Department of the Army, for the agency,
Mary G. Curcio, Esq., and Andrew T. Pogany, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Whether a contractor is capable of complying with a commercial product requirement in the specification involves the agency's affirmative determination of the awardee's responsibility, which generally is not reviewable by the General Accounting Office.

2. Awardee that hired a former government employee did not have an unfair competitive advantage in procurement for drill rig where it is speculative whether former employee even reviewed protester's proprietary information and where employee did not assist awardee in preparing its bid other than to obtain supplier quotations for minor items.

3. Protest the awardee's offered equipment does not comply with requirements of invitation for bids is dismissed as untimely when filed more than 10 working days after the protester received the agency report from which it learned this basis of protest.

DECISION

Blue Tee Corporation protests the award of a contract to Naddaf International Trading Company (NITCO), under invitation for bids (IFB) No. DACW38-91-B-0109, issued by the Department of the Army, Corps of Engineers, for a swamp-buggy mounted drill rig. Blue Tee principally contends that NITCO failed to offer a commercial item and improperly had an unfair competitive advantage by having a former government employee on its staff.

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

The IFB was issued on August 22, 1991, and, as amended, required that bids be submitted by October 1. The IFB,

which requested a drill rig that was of standard manufacture, contained specifications that the rig and its components would have to meet. In addition, section K of the solicitation required bidders to certify that they were offering a commercial item as that term was defined in that same section. The contract was to be awarded to the responsible bidder that submitted the low, responsive bid.

George E. Failing Company (GEFCO)¹ and NITCO were the only bidders that responded to the solicitation. NITCO submitted the low bid of \$155,914, and GEFCO submitted a bid of \$247,021. On October 30, after performing a pre-award survey of NITCO and finding the firm to be a responsible prospective contractor which had successfully performed two contracts for similar products, the Corps awarded the contract to NITCO. On November 8, Blue Tee filed its protest with our Office.

Blue Tee first protests that the Corps improperly accepted NITCO's bid because the rig offered by NITCO is not a commercial item as required by the solicitation.

An offeror's ability to meet a general specification requirement for a commercial item is a matter for the contracting officer to consider in making his responsibility determination. Symtron Sys., Inc., B-242244, Mar. 13, 1991, 91-1 CPD ¶ 282. Generally, our Office will not review a contracting officer's affirmative responsibility determination absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria were misapplied. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1991).

Here, NITCO certified that it was offering a commercial item, and the contracting officer determined that NITCO was responsible. There is nothing in the record showing possible fraud or bad faith on the part of agency officials. See PTR-Precision Tech., Inc., B-243439, Aug. 1, 1991, 91-2 CPD ¶ 110. We also do not view the RFP commercial item requirement as a definitive responsibility criterion. A definitive responsibility criterion is an objective standard established by the agency for a particular procurement to measure an offeror's ability to perform the contract. In effect, such a criterion reflects the agency's judgment that an offeror's ability to perform in accordance with the specifications must be measured not only against the traditional and subjectively evaluated responsibility factors such as adequate facilities and financial resources, but also against a more specific requirement such as a number of years of particular specified experience,

¹Blue Tee, the protester, is the parent company of GEFCO.

compliance with which can be measured objectively. PTR-Precision Tech., Inc., supra. The requirement here for a commercial item is simply one of many design and performance requirements found in the specifications, all of which the contractor must meet, and the contractor's ability to do so is encompassed by the contracting officer's general determination of responsibility. Id.

Blue Tee also complains that the award to NITCO was improper because NITCO had an unfair competitive advantage, since NITCO hired a recently retired Army officer who supervised a major procurement with GEFCO while he was employed by the Army. Blue Tee asserts that in this supervisory capacity, the former Army employee had access to significant proprietary information of GEFCO's, including, vendors, suppliers, costs, blueprints, drawings and other trade secret information specifically relating to rigs purchased by the Army. Blue-Tee alleges that the employee provided this information to NITCO and the firm used it to prepare its bid.

In response, the Corps asserts that there is no indication that the employee in question violated any conflict of interest statutes or otherwise engaged in improper action on behalf of NITCO. The Corps reports that after Blue Tee made the conflict of interest allegation the Corps did an investigation and learned that the employee who retired from the Army had nothing to do with the procurement on behalf of the Corps. The Corps argues that it therefore properly found that the award to NITCO was not precluded.

In addition to the Corps response, the employee in question has submitted two affidavits to our Office in which he has explained his role in the Army in supervising the GEFCO contract and his role for NITCO in connection with the current solicitation. In these affidavits, the employee states that he retired from the Army on February 1, 1990, after beginning terminal leave on Nov. 17, 1989. His last assignment for the Army was as a project manager for Petroleum and Water Logistics Systems at the Army Troop Support Command (TROSCOM) in St. Louis, Missouri. The employee reports that during his tenure as project manager, the Army awarded a contract for an air transportable water well drilling system to GEFCO and that this system was 1 of approximately 75 petroleum and water related items managed by his office. In addition, his office was responsible for developing designing, producing and building a competitive line of water support equipment. During this time, he also was involved in managing requirements associated with the design and system integration and operational testing and fielding of a 1,200 mile tactical pipeline system for a Southwest Asia operational contingency.

The employee states that prior to his assignment as project manager, he had a general knowledge of GEFCO's existence. His first direct knowledge of the company, however, occurred in 1988 when he was required to visit GEFCO's facilities in conjunction with a dispute relating to the first article test of the air transportable drilling system. He reports that the visit lasted 2 1/2 days which he spent clarifying and discussing government requirements that were associated with the first article test and human factors engineering. He asserts that at no time during the visit or at any subsequent time did he have access to proprietary information of GEFCO or any other drilling rig manufacturer. He further asserts that his knowledge of GEFCO's drilling rig designs is very general in nature and is limited to information that is commonly found in trade publications or marketing brochures.

Concerning NITCO, the employee asserts that he became employed by NITCO on January 2, 1990 and that prior to accepting this employment he legally cleared it with the Army Counsel for Retired Military Personnel and the Troscom Command Counsel. He reports that as an employee of NITCO he is an assistant to the president and business development manager. He explains that most drilling systems are designed and manufactured from a variety of off-the-shelf components of other manufacturers and that he does not possess the technical training or experience to designate or select the numerous components that are required in the production of a drilling rig. His in-house role at NITCO has therefore been to obtain quotations and procure purchase orders for those items that have been designated and referred to him for action. He asserts that his only involvement in the preparation of the current Corps bid for NITCO was to obtain quotations from some of NITCO's equipment suppliers for rice and cane type (agricultural) tires and wheel assemblies which were for the swamp buggy and that at the time he obtained these quotes he was not aware of what solicitation they were being procured for. He states that the sources of components he contacted are either current NITCO suppliers or sources he develops from routine business contacts, trade publications and the Thomas Register.

In response, Blue Tee expresses doubt that the employee in question did not use inside information to obtain a competitive advantage for NITCO or actively assist in the preparation of NITCO's bid. Blue Tee also asserts that the employee's affidavit reinforces Blue Tee's position that the award to NITCO is the result of an unfair competitive advantage because it acknowledges the employee was in a position to have access to proprietary information gained while managing a major contract with GEFCO. Blue Tee explains that the contract for air transportable drilling

rigs which the employee supervised was the largest single contract GEFCO has ever undertaken. It asserts that the design, development, costing, vendor sourcing, software development, and training, were scrutinized in detail by TROSCOM when the employee was in charge, and that representatives of TROSCOM stayed at the Blue Tee facility and reported back on all significant details to this employee. Blue Tee reasons that it is impossible that the employee does not have access to the information gathered by his subordinates. In addition, Blue Tee notes the employee himself visited the facility for a few days and argues that during this time the employee became knowledgeable about all aspects of Blue Tee's design, sourcing, quality control procedures and costs.

In our view, Blue Tee has not demonstrated that the award to NITCO was precluded because the firm had a competitive advantage as the result of the employment of a former Army official. That a former government employee is familiar with the work required by an IFB (or, for that matter, previously participated in the government's administration of a prior contract for such work), does not necessarily confer a competitive advantage upon a firm that later employs that individual in competing for a procurement for the same (or a similar) kind of work. See MDT Corp., B-236903, Jan. 22, 1990, 90-1 CPD ¶ 81.


Here, we do not find that the Corps unreasonably determined that NITCO's employment of a former Army official imparted NITCO with a competitive advantage that should have precluded the firm from receiving the contract award. The current solicitation was issued 24 months after the employee in question retired from TROSCOM (an agency different from the agency that issued the current solicitation). Thus, the employee had no access to any current solicitation information. Further, it is entirely speculative on the part of Blue Tee that this employee actually had reviewed any of Blue Tee's proprietary information when he was employed by TROSCOM. In this regard, Blue Tee specifically alleges that it gave the information to TROSCOM employees, not to the employee in question and argues that this employee therefore had obtained the information from his subordinates when they reported back to him. There is no reason, however, to believe this is the case. The employee in question was the project manager for the Blue Tee contract but, as stated in his affidavit, he had numerous other management responsibilities as well. It is clear from Blue Tee's response to the second affidavit that the employee in question did not take part in the day-to-day management of the contract, and there is no reason to assume that his subordinates who did so reported back to him on any and every detail they became aware of in monitoring Blue Tee's performance. Moreover, even if he had access to

proprietary information, there is no reason to believe that he used that information to benefit NITCO. We have no reason to question his sworn statement that he did not assist in the preparation of NITCO's bid other than to obtain supplier quotes for minor items. Blue Tee does not attempt to show that the names of the suppliers contacted were Blue Tee proprietary information. Nor does Blue Tee explain why this employee could not have learned of the sources in the course of normal business. Finally, Blue Tee has not attempted to show how this employee used any other specific information about Blue Tee to the benefit of NITCO. Accordingly, there is no basis to conclude that the Corps decision to accept NITCO's bid was unreasonable.

Finally, in the comments it submitted in response to the agency report, Blue Tee protests that a number of components of NITCO's rig do not meet the requirement for a standard product, and that NITCO improperly certified that it was offering a domestic end item in its Buy American Act certification.

These issues are untimely raised and therefore will not be considered. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), must be filed with our Office or the procuring agency within 10 working days after the protester knows or should know the basis of protest. Here, Blue Tee learned of these bases of protest on December 20, when it received the agency protest report. Blue Tee therefore was required to raise these issues no later than January 7, 1992, 10 working days later. Blue Tee however did not raise them until January 9, when it submitted its comments on the agency report. Accordingly, they are untimely and will not be considered on the merits.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel