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

Decision

Matter of: Joannell Laboratories, Inc.; Nu-Way
Manufacturing Co., Inc.

File: B-242415.8; B-242415.9; B-242415.10

Date: April 15, 1992

Paul Shnitzer, Esq., Crowell & Moring, for the protester, Joannell Laboratories, Inc., and Jacob B. Pompan, Esq., Pompan, Ruffner & Bass, for the protester, Nu-Way Manufacturing Co., Inc. Thomas T. Basil, Esq., and Eric A. Lile, Esq., Department of the Navy, for the agency. Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Although an agency may use traditional responsibility criteria, such as the availability of necessary production, technical equipment and facilities, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business offer as unacceptable under such factors without referral to the Small Business Administration was improper where the agency's decision did not reflect a relative assessment of offers but instead effectively constituted a finding of nonresponsibility.

DECISION

Joannell Laboratories, Inc. and Nu-Way Manufacturing Co., Inc. protest the award of a contract to EC Corporation under request for proposals (RFP) No. N61339-90-R-0011, issued by the Department of the Navy for Main Tank Gun/Weapons Effect Signature Simulator (MTG/WESS) Systems,¹ which encompass both a firing device and pyrotechnic. Both offerors

¹The simulator is intended to provide the capability to train tank crews and infantry to recognize both hostile and friendly tank fire during training exercises. Using a pyrotechnic device, the simulator will provide up to a 60-shot capability and will simulate the flash, smoke, and noise of tank gun fire.

primarily challenge the agency's determination that their proposals were technically unacceptable because of changes made in their best and final offer (BAFO) submissions without adequate explanations.

We sustain Joannell's and Nu-Way's protest.

BACKGROUND

The RFP was issued on April 20, 1990, as a 100 percent small business set-aside. It required the delivery of 50 simulators and 100,000 rounds of ammunition and first article testing with various option quantities of an additional 16,743 simulators and 3,637,500 rounds of ammunition. Options were to be evaluated. The RFP, as amended, provided for award of a fixed-price contract on the basis of technical acceptability/lowest evaluated price. The technical areas of consideration were design, logistics, manprint (software) and management. For purposes of the evaluation, each of these areas was divided into subfactors to be addressed in proposals. These subfactors referenced specific statement of work requirements. For example, logistics consisted of integrated logistics management, interim supply support, provisioning training and three other areas. Under management, areas for evaluation included production engineering and planning, technical risk assessment, data rights, parts approval and documentation. The RFP provided that a rating of unacceptable in any of the technical factors would result in an overall rating of unacceptable.

The RFP contained detailed specifications for the simulators and pyrotechnic devices. The RFP also required offerors to provide test data to demonstrate that their proposed devices met the functional and physical requirements of the specifications. This test data was to include results from humidity, drop, low and high temperature, electro-static discharge, reliability, vibration, pressure retention, and electro-magnetic radiation tests. The RFP further provided for the performance of first article testing to verify compliance.

Three offerors, Joannell, Nu-Way, and EC, submitted proposals by the July 24, 1990, closing date. After the initial technical evaluation, the proposals of all three offerors were determined to be in the competitive range, although none was found to be technically acceptable. Written and oral discussions were held with each offeror, and revised proposals were received.

After the evaluation of the offerors' revisions to their proposals as a result of the discussions, all offerors were found to be technically acceptable and BAFOs were requested.

The agency found that of the three technically acceptable proposals submitted in response to the request for BAFOs, EC's was the lowest priced. The agency awarded a contract to EC on December 14. On December 20, Joannell filed a protest with our Office, and Nu-Way filed its protest on December 21. A stop-work order was issued pending a decision on the protests.

In our decision, Joannell Laboratories, Inc.; Nu-Way Mfg. Co., Inc., B-242415; B-242415.3, May 1, 1991, 91-1 CPD ¶ 424, we sustained Joannell's protest because we found that the Navy improperly awarded the contract to EC whose proposed product was noncompliant with certain material RFP pyrotechnic requirements.² We recommended that the Navy reopen the competition, amend the RFP to state its requirement clearly, and request new BAFOs. We further recommended that following the new BAFOs, if EC was not the successful offeror, the agency should terminate its contract with the firm.

In compliance with our recommendation, the Navy issued Amendment No. 13 on May 24, 1991, to restate the MTG/WESS pyrotechnic device requirements. New pyrotechnic designs were to be submitted on June 14. Amendment No. 14 was issued on June 5 to answer some questions received from the offerors. All offerors responded to the amendments as requested. Discussions were held with all three offerors since all three offerors proposed different pyrotechnic designs than previously submitted to comply with the specifications. After discussions, all offerors were determined to be technically acceptable.

On July 19, a second round of BAFOs was requested with a closing date of July 26. In the request for BAFOs, the agency cautioned the offerors that any changes to their proposal should be documented to provide clear traceability from the original proposal as to the nature and origin of the change. The evaluation team found that in their BAFOs Joannell and Nu-Way made material changes to their proposals without submitting the detailed documentation required by the request for BAFOs. Both firms had eliminated the use of subcontractors and offered to perform the work in-house. On December 6, the contracting officer advised both Nu-Way and

²Nu-Way protested that it was misled by an executive summary included in the RFP which stated that the agency's primary objective was the substantial reduction in the per unit pyrotechnic price, currently priced in excess of \$2 each. We denied Nu-Way's protest because the record showed that Nu-Way submitted the highest BAFO price not because its pyrotechnic unit price was the lowest, but because of the specific system it proposed.

Joanell that their proposals were unacceptable for this reason and that performance of the contract awarded to EC would be resumed.

On December 9 and 16, Joanell, the low offeror, and Nu-Way, the second low offeror, protested the action taken by the agency in retaining EC as the successful contractor and in declaring their proposals unacceptable. On December 17, Joanell submitted an additional protest alleging that EC had proposed a subcontractor that ceased to exist by the date of award. The Navy advises that it decided to continue the stay of performance on this contract.

JOANELL'S PROTEST

Joanell, in its BAFO, stated that Contraves USA, a proposed subcontractor to Joanell for assembly, machining, test and inspection, would no longer be used. Joanell stated that it would be performing these tasks in-house, thereby reducing the manufacturing cost for the system hardware. Joanell also stated that there were nine cost items which were eliminated by this change in its proposal. Joanell in its BAFO decreased its proposed price by approximately 58 percent. Joanell explained that it had more than 40 years of experience in the design and manufacturing of both training and simulation systems and that it had the capacity and resources to perform the additional assembly, machining, test and inspection that is required for manufacturing the hardware units. Joanell further stated that its quality assurance program would assure product quality and conformance to meet the requirements.

The Navy maintains that these changes to Joanell's proposal were material and affected the following three areas: quality assurance, ILS/MANPRINT, and production engineering. The Navy states that Joanell's proposal was initially found acceptable based on its description of how Contraves USA, would perform tasks under the solicitation. As a result of Joanell's failure in its BAFO to address the impact of Joanell's assuming responsibility for the assembly, machining, test and inspection, and purchasing of raw material and components, the Navy states, 17 of the 23 total areas of evaluation were affected, and the evaluation team lacked information necessary to determine Joanell's technical acceptability in these areas.³ For example,

³The Navy found Joanell unacceptable in the manprint area because it allegedly was orally advised by Joanell after BAFOs that Contraves USA would no longer work on the contract. However, the BAFO specifically advises the Navy which tasks Joanell will be performing in-house. All relate to manufacturing the hardware units, and the BAFO does not

Joanell, by offering to perform the tasks which were specifically designated to be performed by Contraves USA, did not disclose its production engineering plan for producing the MTG/WESS firing device. This was particularly troublesome to the Navy since Joanell in its management proposal specifically stated that "since JLI is a small business concern, we have utilized larger businesses (Contraves and Goex) to meet our facility and production needs." The Navy points out that Joanell in its initial proposal stated that Contraves USA would perform nearly all the manufacturing of the MTG/WESS firing device using Contraves USA machining equipment and specifically mentioned eight types of machinery and other equipment available at Contraves USA. The Navy argues that with the elimination of Contraves USA as a major subcontractor, it was not in possession of proposal information from Joanell which demonstrated that it had the same machinery or number of machines capable of producing the MTG/WESS firing device in the numbers required for the production volumes of the contract.

Joanell argues that its offer met all solicitation requirements and should have been found acceptable. Joanell specifically argues that it has the capacity to perform all of the work originally to be performed by Contraves USA and that the Navy improperly rejected Joanell's proposal on what are essentially responsibility grounds. In this regard, Joanell contends that since it is a small business the matter should be referred to the Small Business Administration (SBA) for review under its Certificate of Competency (COC) procedure. See 15 U.S.C. § 637(b)(7) (1988); Federal Acquisition Regulation (FAR) § 19.602-1.

DISCUSSION

Initially, the agency argues that Joanell failed to furnish information concerning how it proposed to do the work in-house which justified its rejection of Joanell's offer as technically unacceptable. The Navy's BAFO request stated that any changes should be documented to provide clear traceability from the original proposal as to the nature and origin of the change. In its BAFO, Joanell explained that it would perform the manufacture of the hardware at its facility to reduce its overall costs. It identified the nine specific cost areas in which its costs would be reduced by elimination of the subcontractor for this work. Joanell

mention the manprint requirements. We thus limit our discussion to the agency's finding of technical unacceptability of the system hardware manufacture subfactors because of Joanell's elimination of Contraves USA from these tasks.

also stated it had considerable experience in the design and manufacturing of such units and had the capacity and resources to perform the additional assembly, machining, test and inspection required to manufacture the units. It further stated that Joannell's quality assurance program would assure product quality and conformance with the contract requirements and identified the specific quality assurance program required by the RFP. Thus, Joannell offered to perform this work in-house without exception. While we agree that Joannell could have provided more detail as to its production plans, we cannot conclude that Joannell's BAFO did not substantively comply with the literal terms of the BAFO request.

The dispositive issue in this case is whether the agency properly could reject Joannell's proposal on the basis that Joannell did not provide sufficient information to demonstrate that it could perform the functions previously proposed for subcontracting. As a general matter, whether an offeror has the necessary production, technical equipment and facilities for contract performance, or the ability to obtain them, is a matter of responsibility. FAR § 9.104-1(f) (FAC 90-8). While traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement, the factors may be used only if the agency's needs warrant a comparative evaluation of those areas. Clegg Indus., Inc., 70 Comp. Gen. 680 (1991), 91-2 CPD ¶ 145; Sanford and Sons Co., 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266. Otherwise, an agency effectively would be determining the responsibility of an offeror under the guise of making a technical evaluation of proposals. Under the Small Business Act, agencies may not find that a small business is nonresponsible without referring the matter to the SBA, which has the ultimate authority to determine the responsibility of small business concerns. Clegg Indus., Inc., supra.

Here, the Navy did not perform a comparative evaluation of proposals. It simply determined whether each offer was or was not acceptable under each technical evaluation factor. The Navy determined acceptability solely on a "go-no-go" basis, and the record shows that Joannell's proposal was found technically unacceptable solely on the basis of traditional responsibility factors, primarily in areas concerning quality assurance and production, technical equipment and facilities. For example, with respect to the evaluation of Joannell's final BAFO, while the Navy found Joannell's design to be technically acceptable, it determined that it did not have enough information to determine if Joannell could handle the added responsibility of assembly, machining, test and inspection of the MTG/WESS firing device including raw materials and purchased parts selection. The Navy further found that it had no information from Joannell

which established that Joannell had the same machinery or number of machines capable of producing the MTG/WESS firing device required for the production volumes of the contract. The Navy further determined that it did not have information establishing that Joannell had the space available for manufacturing, labor with the necessary technical skills and the special tools and test equipment. Although the agency evaluators also advised that Joannell furnished no information showing that the firm considered "the technical risks involved with pulling . . . tasks in-house," again this conclusion was a go-no-go determination and was clearly related to the agency's concerns regarding Joannell's production capabilities. Thus, the determination that Joannell was technically unacceptable was, in effect, a determination by the Navy that Joannell did not have necessary production, technical equipment and facilities to perform the contract and thus was not a responsible contractor. Consequently, the rejection of Joannell's proposal without a referral to SBA for complete consideration under the COC procedures was improper. Detvens Shipyards, Inc., B-244918; B-244918.2, Dec. 3, 1991, 71 Comp. Gen. ____, 92-1 CPD ¶ ____, PHE/Maser, Inc., 70 Comp. Gen. 689 (1991), 91-2 CPD ¶ 210; Modern Sanitation Sys. Corp., B-245469, Jan. 2, 1992, 92-1 CPD ¶ 9; Clegg Indus., Inc., supra.¹

We recommend that the issue of Joannell's responsibility be referred to SBA for a final determination under the COC procedures. If Joannell is determined to be responsible, we recommend that the Navy terminate EC's contract and make award to Joannell if otherwise appropriate. The record shows that Nu-Way was found technically unacceptable for the same reasons as Joannell. Since Nu-Way is the second-low offeror, should Joannell's COC application be denied, the matter of Nu-Way's responsibility should be referred to SBA for a

¹Joannell also argues that EC's BAFO indicates that EC made significant changes to its proposal relating to the firing device and there is no evidence in the record with respect to the adequacy of the documentation submitted by EC to support the changes. Contrary to Joannell's contentions, the record shows that EC's changes to its firing device were fully documented and reasonably determined by the agency to be acceptable. Joannell also contends that prior to the final round of BAFOs, EC subcontracted with Advanced Systems International (ASI) for the engineering support services required under the RFP. We have reviewed EC's revised proposal, its responses to clarification questions and its BAFO submission and do not find any indication that ASI was ever proposed as a subcontractor for any of the RFP requirements.

determination under the COC procedures. We find Joannell and Nu-Way entitled to the costs incurred in pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

Milton J. Avolar

Acting Comptroller General
of the United States