



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

Decision

Matter of: General Metals, Inc.

File: B-247560

Date: May 29, 1992

Karl Dix, Jr., Esq., and George Papaioanou, Esq., Smith, Currie & Hancock, for the protester.
Robert L. Mercadante, Esq., Defense Logistics Agency, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging issuance of a purchase order based on low price to firm proposing a foreign product is sustained where request for quotations incorporated the clause set forth at Federal Acquisition Regulation § 52.219-4, which required products to be manufactured or produced by domestic small businesses; contracting agency was on notice prior to issuance of the purchase order that awardee intended to provide a foreign product; and protester, a small business which submitted a slightly higher quotation, proposed a domestic product.

DECISION

General Metals, Inc. (GMI) protests the issuance of a purchase order to Engineering Metals Co. (EMCO), under request for quotations (RFQ) No. DLA500-91-Q-JU28, a small business-small purchase set-aside, issued by the Defense Industrial Supply Center (DISC) for approximately 2,341 pounds of metal bar (National Stock Number 9510-00-266-9259). The protester contends that since EMCO offered a foreign product contrary to the RFQ's domestic product requirement, the firm is ineligible for award.

We sustain the protest.

The RFQ incorporated by reference the clause set forth at Federal Acquisition Regulation (FAR) § 52.219-4, which, among other things, required the products furnished under the contract to be manufactured or produced by domestic small businesses. EMCO submitted the low quote of \$6.21 per pound, but offered a foreign product. GMI's quote of \$6.34 per pound, based on supplying a domestic product, was second

low.¹ The only other firm that responded to the RFQ withdrew from the competition. On January 30, 1992, DISC issued a purchase order to EMCO based on its low price, in the total amount of \$14,537.61, despite the firm's proposing to supply a foreign product. This protest followed. The agency has directed EMCO to suspend performance on the contract pending resolution of the protest.

Although this procurement was conducted under the small purchase procedures of part 13 of the FAR, and therefore was not governed by the usual competition procedures, all procurements, including small purchases, must be conducted consistent with the concern for fair and equitable competition inherent in any procurement. Armour of Am., B-237690, Mar. 19, 1990, 90-1 CPD ¶ 304. In this connection, it is fundamental that an agency may not solicit quotations on one basis and subsequently award a contract on a materially different basis when other vendors would be prejudiced by such award. Discount Mach. and Equip., Inc., B-220949, Feb. 25, 1986, 86-1 CPD ¶ 193. Here, issuance of a purchase order to EMCO was improper since it was made on a materially different basis--i.e., acceptance of a foreign product--from that on which quotes were solicited.

The RFQ incorporated the clause set forth at FAR § 52.219-4, accompanied by the legend "NO FOREIGN MATERIAL" conspicuously displayed on the RFQ. While EMCO initially submitted alternate quotes based on supplying either a domestic or a foreign product, EMCO subsequently informed DISC prior to award that it could not provide a domestic product and withdrew that quote, leaving effective only its quote based on supplying a foreign product. Accordingly, since the agency was on notice prior to award that--contrary to the RFQ's prohibition--EMCO intended to supply a foreign product, DISC

¹These quotes were the second set submitted by the two firms in response to a reduction in the amount of metal bar initially sought. On January 23, the agency advised GMI after initial quotes were received that the firm was ineligible for waiver of first article testing based on its proposed supplier; consequently, GMI proposed a different supplier in its second quote. To the extent that GMI objects to the agency's apparent insistence that its supplier qualify for waiver of first article testing, the protest is untimely. Any objections GMI had to the agency's position had to have been filed within 10 working days of January 23, or by February 6. See 4 C.F.R. § 21.2(a)(2) (1992); Swafford Indus., B-238055, Mar. 12, 1990, 90-1 CPD ¶ 268. Accordingly, GMI's allegations concerning first article testing, filed on February 10, are untimely and will not be considered.

should have rejected EMCO's quotation. See Bulloch Int'l, Inc.--Recon., B-237369.2, Apr. 10, 1990, 90-1 CPD ¶ 377, and cases cited therein.

The agency relies on our decisions in Plaza Home Maint., R-243859, July 30, 1991, 91-2 CPD ¶ 103, and Smoke Busters, B-219458, Nov. 1, 1985, 85-2 CPD ¶ 501, to argue that the award should not be disturbed because GMI has not shown evidence of a "conscious or deliberate effort" on the part of DISC to exclude GMI. Those cases concern a contracting agency's discovery, after award, that the protester's lower quotation was misplaced and therefore not considered. We held that in view of the need for the orderly and expeditious fulfillment of an agency's small purchase requirements, we will not object to the award of a small purchase contract under those circumstances, absent evidence of a conscious or deliberate effort by contracting personnel to prevent the selection of the protester.

The cases cited by the agency are distinguishable. In those cases, we found that the agencies' need for the prompt completion of their small purchases outweighed the protesters' interests in correcting an inadvertent error in the procurement, discovered after award and after performance of the contract was either begun or completed. In contrast here, DISC issued an RFQ that precluded award to a firm proposing to supply foreign material; the agency was on notice prior to award that EMCO intended to supply a foreign product; and, subsequent to the improper award, the agency directed EMCO to suspend contract performance pending resolution of this protest. The issuance of a purchase order to EMCO was clearly contrary to the terms announced in the RFQ, and cannot reasonably be construed as an inadvertent "error" in the procurement discovered after award.

The improper issuance of the purchase order to EMCO notwithstanding, the agency maintains that we should not disturb the award, essentially arguing that GMI has not been prejudiced. DISC contends that since GMI, the only other firm in competition, would not be able to "sustain a pre-award survey or other source verification procedure," and since the firm is not capable of providing the required item, the small business set-aside would be automatically dissolved, rendering proper the award to EMCO.

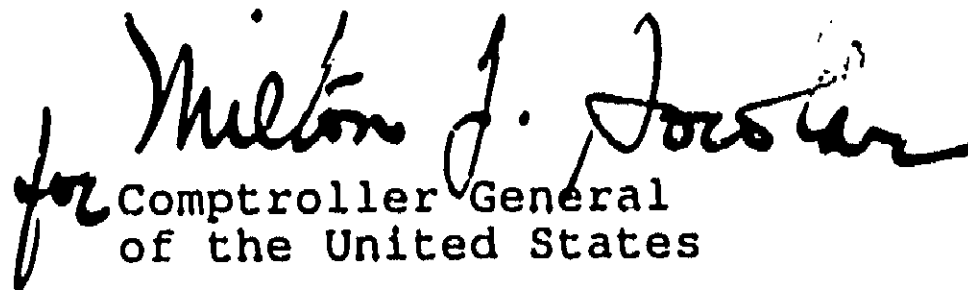
As a preliminary matter, DISC has not conducted a pre-award survey of GMI, and, except for advancing its argument in response to this protest, the agency has not determined that the firm is otherwise ineligible for award. Should the agency determine that GMI, a small business, is not capable of providing the required item, that finding concerns GMI's responsibility, which DISC is required to refer to the Small Business Administration for consideration under its

certificate of competency procedures as required by the Small Business Act, 15 U.S.C. § 637(b)(7) (1988). See J. Johnson Enter., B-234245, May 18, 1989, 89-1 CPD ¶ 478.

Further, in the event that the small business set-aside were to be dissolved, the award to EMCO could not stand. Allowing EMCO to retain the award if the set-aside is dissolved, without soliciting quotes on an unrestricted basis, would be improper. See FAR § 13.105(d)(3); CompuMed, B-242118, Jan. 8, 1991, 91-1 CPD ¶ 19 (where no small business offers are received under a small business set-aside, agency properly withdrew set-aside and resolicited the requirement on an unrestricted basis, so that all eligible firms may compete).

We recommend that the agency determine whether GMI is eligible for award and, if so, terminate the purchase order issued to EMCO, see FAR § 13.504, and issue a purchase order to GMI.² In any case, GMI is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). GMI should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.


for Comptroller General
of the United States

²In its comments, GMI contends that DISC violated the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C § 423 (Supp. I 1989), by allegedly disclosing to EMCO its proposed domestic source. Since we sustain the protest on other grounds and are recommending award to GMI, we need not address this issue.