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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Sales Agency

File: B-247529.2

Date: August 6, 1992

Herbert C. Ross for the protester.
John Lin for Crystal Associates d/b/a Howard Johnson Hotel, an interested party.
Gerald P. Kohns, Esq., Department of the Army, 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

1. Protester whose bid was rejected as nonresponsive is an interested party to challenge award to only other bidder; if protest were sustained, the remedy would be termination of the awardee's contract and a resolicitation under which the protester could compete.

2. The General Accounting Office will review allegations concerning misrepresentations of contingent fee arrangements where the protester offers some evidence and not mere speculation that contracting officials should have been on notice before award that the prospective awardee misrepresented the existence of a contingent fee arrangement in its bid.

3. Solicitation's broad requirement that the successful bidder's facility comply with the "Uniform Fire Code" is a condition of performance that an awardee must meet and does not constitute a definitive responsibility criterion; whether awardee actually complies with that provision is a matter of contract administration.

DECISION

General Sales Agency, as agent for Sheraton Inn, protests the award of a contract to Crystal Associates d/b/a Howard Johnson Hotel under invitation for bids (IFB) No. DAKF61-92-B-0005, issued by the Department of the Army to provide meals and lodging for the Military Entrance and Processing Station, Des Moines, Iowa. The protester alleges that the award was improper because contracting officials should have been on notice, prior to award, that Howard Johnson misrepresented in its bid the existence of a contingent fee

arrangement with Lodging Consultants, Inc., its alleged agent. The protester also argues that the agency misapplied definitive responsibility criteria in the IFB.

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

BACKGROUND

Of the five bids the agency received by the December 11, 1991, bid opening date, the agency rejected the apparent low and second low bids as nonresponsive, and rejected the third low bidder as nonresponsible. On April 8, 1992, the agency awarded the contract to the fourth low bidder, Howard Johnson. General Sales, who submitted the fifth-low bid,[1] filed this protest with our Office on April 10, 2 days after award.

As prescribed in Federal Acquisition Regulation (FAR) § 3.404, the IFB included the text of FAR § 52.203-4, "Contingent Fee Representation and Agreement," which requires a prospective contractor to certify: 1) whether it has employed or retained any entity to solicit or obtain the contract, and 2) whether it has agreed to pay such entity a fee contingent upon the award of the contract. Bidders who answer either item affirmatively are required to submit a completed Standard Form (SF) 119, "Statement of Contingent or Other Fees." See FAR § 3.405(b)(5).[2] If a bidder answers both items in the negative, the contracting officer may accept that representation and proceed with award, unless there is reason to question its accuracy. See FAR § 3.405(b)(4). In the representation accompanying its bid, Howard Johnson answered both items in the negative--i.e., that it had no contingent fee arrangement with any entity. Having no reason to question the accuracy of Howard Johnson's certification, the contracting officer accepted that representation and proceeded with award.

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[1]Although it appears from the record that the bid was actually submitted by Capitol Properties, Inc., d/b/a Sheraton Inn, for clarity and consistency we will refer to General Sales as the protester.

[2]As relevant here, SF 119 requires prospective contractors to identify the agent or representative; calls for offerors to describe the offeror's relationship with that entity (e.g., agent, representative, broker, etc.); and requires that the prospective contractor either provide to the contracting agency a copy of any existing written contract or agreement covering the relationship, or describe in detail the terms of such agreement.

PROTESTER'S CONTENTIONS

The protester alleges that Howard Johnson falsified its contingent fee representation. According to General Sales, not only did the awardee misrepresent the existence of a contingent fee arrangement that Howard Johnson had with its agent, but the contracting officer should have been on notice, prior to award, that Howard Johnson had such an arrangement.

In support of its assertion, General Sales proffers a copy of a letter that Howard Johnson submitted to the agency after the Army rejected the low and second low bidders, objecting to the proposed award to the third-low bidder.[3] The protester asserts that although Howard Johnson's letter was signed by the hotel's owner, the protester recognizes it as having been written by Howard Johnson's agent. General Sales thus argues that before award, the contracting officer should have been on notice from the wording of that letter that Howard Johnson had deliberately misrepresented the existence of a contingent fee arrangement in its bid. Given that the letter provides a reasonable basis to question the accuracy of Howard Johnson's representation, General Sales argues, the Army should not have proceeded with award without first obtaining and reviewing a completed SF 119 from Howard Johnson.

PROCEDURAL MATTERS

Interested Party Status

The Army argues that the protest should be dismissed because the protester is not an "interested party" under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1992). In a letter dated April 7, 1992, the contracting officer rejected the protester's bid as nonresponsive because it imposed conditions that modified the requirements of the IFB. See FAR § 14.404-2(d). General Sales did not protest that rejection. The Army argues that since the protester's bid was rejected as nonresponsive, General Sales lacks the necessary direct interest to qualify as an "interested party" under our Regulations, because the firm would not be eligible for award even if its protest were sustained.

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[3]In its letter to the agency, Howard Johnson alleged that Best Inns--then positioned as the apparent low bidder following the rejection of the two lower bids--had misrepresented its alleged contingent fee arrangement with General Sales (Sheraton Inn's agent in this protest). Prior to resolving that issue, however, the Army rejected Best Inns as nonresponsible and subsequently made award to Howard Johnson which was next in line for award.

Since the awardee submitted the only other apparently successful bid remaining in competition, however, if the protest were sustained, the appropriate remedy would be to terminate the awardee's contract and issue a new solicitation, under which General Sales could compete. See Dantec Elecs., Inc., B-243580, July 17, 1991, 91-2 CPD ¶ 60. Accordingly, General Sales is an interested party to challenge the award.

Jurisdiction

The Army also argues that the protester's allegations concerning Howard Johnson's alleged misrepresentation of a contingent fee arrangement are for consideration by the procuring agency in accordance with FAR § 3.409, rather than by our Office. In support of its position, the agency relies on our decisions in Corbin Superior Composites, Inc., B-236777.2, Jan. 2, 1990, 90-1 CPD ¶ 2, and HLJ Mgmt. Group, Inc., B-225843.6, Mar. 24, 1989, 89-1 CPD ¶ 299, citing Four-Phase Sys., Inc., B-189585, Apr. 19, 1978, 78-1 CPD ¶ 304, in which we dismissed post-award allegations concerning the awardee's contingent fee representation. These cases are inapplicable here.

In the cited cases, the protesters did not allege, nor was there any evidence or other reasonable basis in the record to suggest, that prior to award contracting officials had reason to question the offerors' representations that they had no contingent fee arrangement.[1] Here, in contrast, the protester contends that certain information available before

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[1]In Four-Phase Sys., Inc., for instance, although the protester alleged that the awardee had improperly failed to disclose in its proposal that it had employed a third party to assist the awardee in the procurement, the protester provided no evidence that the contracting officer should have been aware of such arrangement prior to award. In HLJ Mgmt. Group, Inc., although the awardee indicated in its proposal that it did not have a contingent fee arrangement, the protester provided a copy of an agreement between the awardee and a firm which had agreed to provide it with proposal preparation and support in exchange for payment. HLJ did not allege, however, and there was no evidence in the record, that contracting officials either knew or should have known of the existence of that relationship before award. Similarly, in Corbin Superior Composites, Inc., although the protester claimed that the awardee had failed to reveal an alleged contingent fee arrangement, except for its bare assertions, the protester provided no evidence of the alleged relationship. Nor did the protester contend that contracting officials had any information, before award, to suspect that such arrangement existed.

award should have prompted the contracting officer to inquire further into the awardee's certification.

We view a contracting officer's duty with respect to the contingent fee representation to be similar to that with respect to an offeror's certification as to whether it will furnish domestic end products for purposes of the Buy American Act, 41 U.S.C. §§ 10a et seq. (1988). See FAR § 52.225-1. Although the Buy American Act certifications are usually accepted at face value, a contracting officer should not automatically rely on an offeror's certification without investigating further when he has reason to question whether a domestic product will be furnished. See Cryptek, Inc., B-241354, Feb. 4, 1991, 91-1 CPD ¶ 111 (contracting officer properly went beyond self-certification and verbally confirmed that offered item complied with the Buy American Act); American Instrument Corp., B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287 (contracting officer reasonably relied on self-certification where, in response to an agency-level protest on a previous procurement for similar items, awardee confirmed that it would provide a domestic product). See also Yale Materials Handling Corp.--Recon., B-226985.2 et al., June 17, 1987, 87-1 CPD ¶ 607 (applying similar rule to specialty metals clause certification). Similarly, if the contracting officer has information that casts doubts on the validity of the contingent fee representation, he should not blithely rely on it, but, in light of the strong public policy against contingent fees (see infra), should inquire further.

Here, General Sales has identified information available to the agency before award which General Sales believes required the contracting officer to question whether the awardee had improperly failed to disclose in its bid a contingent fee arrangement with its agent. Accordingly, since the contentions made here go beyond mere bare assertions that the awardee misrepresented the existence of contingent fee arrangement in its bid, we will review the reasonableness of the agency's decision to rely solely on Howard Johnson's certification just as we will review the reasonableness of a decision to rely on the Buy American Act certification.

DISCUSSION

The purpose of the contingent fee prohibition is to prevent the attempted or actual exercise of improper influence by third parties over the federal procurement system. Quinn v. Gulf & Western Corp., 644 F.2d 89 (2d Cir. 1981). Except under limited circumstances, contingent fee agreements for

an agent to solicit or obtain a contract have long been considered contrary to public policy. See 10 U.S.C. § 2306(b) (1988).[5] As such, where there is specific evidence or other reasonable basis to suspect the accuracy of a bidder's certification concerning the existence of a contingent fee arrangement, FAR § 3.409(b) requires contracting officials to review the facts and, if appropriate, reject the bid.

General Sales maintains that Howard Johnson's letter to the agency, objecting to the proposed award to the then third-low bidder, should have placed the contracting officer on notice that Howard Johnson had misrepresented the existence of a contingent fee arrangement in its bid. That letter, a copy of which is in the record, is dated March 27, 1992, and contains the notation "AGENCY PROTEST FAR § 33.101." The letter consists of three pages--all of which are typewritten on Howard Johnson Hotel stationery--and is signed by "Mr. John Lin, owner, Crystal Associates, d/b/a Howard Johnson." The letter sets forth a series of facts and events which purportedly show that the then proposed awardee (Best Inns) misrepresented its contingent fee arrangement with General Sales, the protester on behalf of Sheraton Inn here.

We have thoroughly reviewed that document and, while there are several specific references concerning an alleged contingent fee arrangement between Best Inns and General Sales, we find no mention of, or reference to, Lodging Consultants, Howard Johnson's alleged agent,[6] or to anything else that should have caused the contracting officer to doubt the contingent fee representation in the Howard Johnson bid. Thus the letter on which the protester relies provides no basis to conclude that contracting officials should have suspected that Howard Johnson had entered into a contingent fee arrangement with any entity. In the absence of such evidence, we find

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[5]By their terms, 10 U.S.C. § 2306(b) and 41 U.S.C. § 254(a) (1988)--the statutory basis for the contingent fee prohibition--only apply to negotiated contracts. As a matter of policy the statutory prohibition for negotiated contracts has been extended to sealed bids. FAR § 3.403. Accordingly, the contingent fee prohibition applies to all federal procurements.

[6]We note that Howard Johnson's agency-level protest contains precisely the kind of specific information that, if provided prior to award, reasonably should have led the contracting officer to question the accuracy of Best Inns's certification in its bid that it had no contingent fee arrangement with any party.

that the contracting officer had no basis to question the accuracy of Howard Johnson's certification. We therefore conclude that the contracting officer reasonably relied on Howard Johnson's certification and properly proceeded with award to the firm without investigating further.

Definitive Responsibility Criteria

General Sales argues that the agency improperly applied a definitive responsibility criterion in the IFB. The protester states that the IFB required the successful bidder's facility to comply with the "Uniform Fire Code," and argues that since Howard Johnson does not meet certain standards of that code as adopted by the City of Des Moines, the award was improper.

Definitive responsibility criteria are specific and objective standards, established by an agency for a particular procurement to measure an offeror's ability to perform the contract. Management Eng'rs, Inc.; KLD Assocs., Inc., B-233085; B-233085.2, Feb. 15, 1989, 89-1 CPD ¶ 156. In contrast, the IFB's broad requirement here that the successful bidder's facility comply with the "Uniform Fire Code" is simply a condition of performance that Howard Johnson must meet. See Volunteers of Am., 66 Comp. Gen. 332 (1987), 87-1 CPD ¶ 271. As such, whether Howard Johnson complies with the Uniform Fire Code as adopted by the City of Des Moines is a matter of contract administration which we will not consider. Junction City-Fort Riley-Manhattan Transp. Co., Inc., B-235866, July 6, 1989, 89-2 CPD ¶ 21.

The protest is denied in part and dismissed in part.

Robert P. Murphy
for James F. Hinchman
General Counsel