



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: GS Elektro-Schewe GmbH

File: B-259103.2

Date: April 13, 1995

Reed L. von Maur, Esq., and Michael J. Murphy, Esq., von Maur & Partners, for the protester.
Riggs L. Wilks, Esq., Michael G. Skennion, Esq., and Susan D. Tigner, Esq., Department of the Army, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined to terminate contract and resolicit after discovering that at least one bidder had been given written notice from the agency of a country-of-origin restriction not included in the solicitation; as a result, potential bidders were not competing on an equal basis, and it was not clear whether the solicitation reflected the agency's actual requirements.

DECISION

GS Elektro-Schewe GmbH (Schewe) protests the corrective action taken under invitation for bids (IFB) No. DAJA02-94-B-0084, issued by the regional contracting office of the Department of the Army in Seckenheim, Germany, for the purchase of telephone cable and related supplies. Based on information learned during the course of a protest by Schewe of award to Heim Elektrogrosshandel, the Army terminated the relevant portions of Heim's contract and decided to resolicit those requirements. Schewe contends that resolicitation is improper and that it should have received award as the responsible offeror submitting the low responsive bid.

We deny the protest.

The Army's Seckenheim regional contracting office issued the IFB on June 28, 1994. The IFB was for a "brand name or equal" procurement, and indicated that bidders could either

offer products of the brand name (Siemens) or "equal" products, with the equivalency measured by compliance with salient characteristics identified in the IFB. The IFB required bidders offering equal products to submit with their bid descriptive literature demonstrating that the offered products met the salient characteristics.

Before bid opening, Schewe contacted the agency to request information concerning the technical requirements under the solicitation. In response, the agency provided Schewe a document entitled "Technical Standardization Requirements" that stated that the cable must be manufactured in Germany. The IFB itself did not include such a requirement.

At bid opening on July 28, there were four bids. Heim's bid of DM 359,055 was low; Schewe's bid of DM 566,590 was next low. Neither bid indicated (either explicitly or through inclusion of descriptive literature) that it was for an equal product rather than for cable manufactured by Siemens. Because Heim's bid was so much lower than the other three, the Army sought verification; Heim confirmed that its bid was not mistaken. As a result, on August 18, the Army awarded to Heim, whose bid appeared to be the low, responsive bid from a responsible bidder.

Schewe filed an agency-level protest on September 2, alleging that Heim intended to deliver a purportedly equal product but that its bid did not disclose this fact.¹ In response to an inquiry from the Army, Heim advised the agency that it did, in fact, intend to supply an equal product, rather than Siemens cable. The Army nonetheless denied the agency-level protest because it viewed the question of the substitution as a matter of contract administration.

On October 24, Schewe protested to our Office. In addition to repeating its agency-level protest ground, Schewe alleged that Heim's bid was nonresponsive because the product offered was not manufactured in Germany, as Schewe had been told was required. Nine days later, on November 2, the Army terminated the contract line items at issue for the convenience of the government.² The Army advised our Office and the protester in a November 28 submission that it

¹Schewe has not alleged that the cable bid by Heim is not equal (that is, that it would fail to meet any of the salient characteristics identified in the IFB).

²The remaining line items are not at issue in the protest.

intended to resolicit the requirements covered by those line items. Because this action rendered academic Schewe's challenge to the propriety of the initial award of those line items to Heim, our Office dismissed the protest.

Schewe agrees with the propriety of the termination, but protests the decision to resolicit, arguing that the agency was required to award to Schewe because it was the responsible bidder offering the lowest-priced, responsive bid.³ Schewe also contends that the agency's corrective action demonstrates that the protester is entitled to the costs of filing and pursuing its initial protest.

The preservation of the integrity of the competitive bidding system requires that the determination to cancel an IFB after bids have been exposed at bid opening be supported by a compelling reason. Federal Acquisition Regulation § 14.404-1(a)(1). Determining whether a compelling reason exists involves the exercise of the contracting agency's judgment; we review such a determination only to ensure that it is reasonable. Control Concepts, Inc., B-233354.3, Apr. 6, 1989, 89-1 CPD ¶ 358. A decision to terminate a contract and resolicit for the requirement satisfies this standard if, for example, the solicitation did not adequately reflect the government's needs, or a defect in the procurement process resulted in actual or potential bidders not being treated fairly. See Special Waste, Inc., 67 Comp. Gen. 429 (1988), 88-1 CPD ¶ 520; HDL Research Lab, Inc., B-254863.3, May 9, 1994, 94-1 CPD ¶ 298.

Here, the IFB did not state that the cable was required to be manufactured in Germany, but the agency distributed to at least one bidder a written requirement to that effect. The record before our Office does not disclose the agency's actual needs in this regard. If the agency does not actually require German-manufactured cable, potential bidders receiving the additional written requirement may have been misled or even deterred from competing; if the agency does require German-manufactured cable, the IFB did not reflect the agency's minimum needs. In either case, the circumstances provide the Army with a reasonable basis for its decision.

³Schewe labeled its submission as a request for reconsideration of our dismissal. Because it relates to the agency's decision to resolicit rather than to the initial award to Heim, we do not view it as a reconsideration request, but as a protest of the failure to award to Schewe upon partial termination of Heim's contract.

Moreover, Schewe's contention that it offered the low responsive bid because the awardee's bid was nonresponsive for surreptitiously offering "equal" cable is without merit. As the Army explained in denying the agency-level protest, Heim's bid appeared responsive on its face. Because it did not indicate an intent to furnish other than the brand name product, Heim was not required to provide further information, such as descriptive literature. The bid simply committed Heim to supplying the brand name product. Schewe's allegation that Heim's low price would have caused it to incur a loss in supplying the Siemens product does not represent a valid basis of protest. See Diemaster Tool, Inc., B-238877, Apr. 5, 1990, 90-1 CPD ¶ 375.

Schewe also requests that our Office find that it is entitled to reimbursement of the cost of filing and pursuing its initial protest. We deny that request. Where an agency takes corrective action prior to our issuing a decision on the merits, we may declare the protester entitled to recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.6(e). We will find a protester so entitled, however, only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, the agency has taken reasonably prompt corrective action. Id.

In deciding whether an agency's corrective action was so delayed as to warrant the award of costs, the determination of the appropriate date from which the promptness of the

⁴The Army's consideration (ultimately rejected) of the possibility of allowing Heim to provide another manufacturer's product, if it met all of the IFB salient characteristics, is a question of contract administration that our Office does not consider. 4 C.F.R. § 21.3(m)(1) (1995). See Wholesale Office Furniture, Inc., B-216081, Dec. 4, 1984, 84-2 CPD ¶ 618. Our Office will consider the propriety of a modification to a contract only where there is a material difference between the modified contract and the contract for which the offerors were competing. CAD Language Sys., Inc., 68 Comp. Gen. 376 (1989), 89-1 CPD ¶ 364. That is not the case here. Modification of Heim's contract to permit supplying a product not manufactured by Siemens would plainly be within the scope of the contract covered by the solicitation here, so long as the alternative product met the salient characteristics (a point not disputed by Schewe in this case), since the IFB explicitly permitted bidders to offer equal products.

corrective action is measured is critical. See, e.g., Crown Eng'g--Entitlement to Costs, B-251584.2, May 24, 1993, 93-1 CPD ¶ 403. The relevant date is not the date of the agency-level protest, but the date on which the protest was filed with our Office. Id. Because here the agency terminated the relevant portions of the solicitation within 2 weeks of the latter date, it did not unduly delay its corrective action. Id.

The protest is denied.

\s\ Ronald Berger
for Robert P. Murphy
General Counsel