DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

60099 97595

FILE: B-181454 DATE: October 29, 1975

MATTER OF: Corbin Sales Corporation

DIGEST:

1. That portion of protest which relates to prior procurements of nitrogen receivers prior to initiation of present procurement will not be considered on merits since it does not directly relate to present procurement and since no useful purpose would be served by decision regarding past procurements long since completed.

2. Agency's determinations as to whether protester and competitor are "manufacturers" under Walsh-Healy Act may not be disturbed by GAO since responsibility of determining whether bidder is qualified as manufacturer under Act rests in first instance with agency and such determination is subject to review by Secretary of Labor and not by GAO.

3. Agency acceptance of bid which was extended after bid opening only as to items offered on basis of first article approval is not objectionable as an alleged acceptance of a bid modified after bid opening, since limited extension of bid was not precluded by solicitation, Government did not relinquish any right or benefit in accepting an extension of only part of the bid, and record indicates bidder's alternate offer based on test waiver would not have been acceptable in any event.

4. Bid in line for award need not be rejected for alleged failure to submit requested information since this information was in fact contained in bid, and placement of information in different part of bid than directed is minor informality which can be waived.

5. Contention that method of procurement of items on basis of first article approval should be changed to Qualified Products List - type procurement is premature and will not be considered since it is directed at future procurement practices.

Corbin Sales Corporation (Corbin) protests the determination of the Navy Aviation Supply Office that Corbin is not eligible for award under invitation for bids (IFB) No. N00383-74-B-0307 and the subsequent award of a contract to Varo, Inc., under that solicitation.

Under this IFB the Navy solicited bids for nitrogen receivers, which are components of the launchers for the Sidewinder air-to-air missile. Four bids were received, and the low bid of MKB Manufacturing Corporation was rejected as nonresponsive for failure to acknowledge the two amendments to the IFB. The second low bidder, Corbin, was ultimately considered ineligible for award because it was determined not to be a "manufacturer" under the Walsh-Healy Act, 41 U.S.C. §§ 35-45 (1970). In response to an earlier protest by Corbin against this determination, we concluded that the Navy's determination was reviewable by the Department of Labor (Labor) and not this Office, and accordingly, we declined to take any further action regarding the protest. Corbin Sales Corporation, B-181454, July 10, 1974, 74-2 CPD 21.

The record shows that Corbin and the third low bidder, Varo, Inc., each challenged the other's status as a "manufacturer" under the Walsh-Healey Act. The contracting officer's determination that Corbin was not a "manufacturer" was concurred in by Labor on June 5, 1974, and again on August 12, 1974, after consideration of additional information submitted by Corbin. Meanwhile, the contracting officer's determination that Varo, Inc., was a "manufacturer" was submitted to Labor for review.

On October 7, 1974, Corbin filed a protest with our Office against the award of the instant contract to any other firm. Three days later, Labor advised the contracting officer that it concurred in his determination that Varo qualified as a "manufacturer". Award was made to Varo despite the pendency of Corbin's protest, after notice to our Office, on the basis of the urgent need which existed for the receivers.

In the instant protest, Corbin first alleges that the contracting officer's determinations as to the status of Corbin and Varo under the Walsh-Healey Act were erroneous. As we observed in our decision of July 10, 1974, the authority for reviewing these determinations rests with the Department of Labor, which sustained the contracting officer's position. F & H Manufacturing Corporation, B-183491, April 29, 1975, 75-1 CPD 266. We therefore see no useful purpose which would be served by our examination of this issue.

A major contention of Corbin's is that the instant contract award is but the latest development in a conspiracy between Navy and Varo employees who have sought since 1966 to eliminate Corbin as a manufacturer of nitrogen receivers. Much of the material submitted by Corbin in support of its protest relates to events which preceded this procurement.

Corbin specifically contends that the Navy has knowingly procured defective receivers from Varo when the Navy also recognized that Varo was a "bid broker" and not in fact a manufacturer; that the Navy has in the past relaxed or waived specifications and tests regarding substandard Varo products so as to permit acceptance of units which would otherwise have been rejected; and that the Navy has approved unmerited contract price increases for Varo's engineering change proposals. Corbin views the contracting officer's refusal to consider it a "manufacturer" for this procurement, despite a favorable DCAS report, as another attempt to foreclose Corbin from competing for these items. The Navy denies these allegations.

Protests concerning the propriety of the Navy's procurement of nitrogen receivers have been considered by this Office on several past occasions. See, e.g., our decisions B-162196, September 19, 1968; B-162196, August 15, 1968. A protest by Corbin Manufacturing Company, the predecessor to Corbin Sales Corporation, presented this Office with many of the same issues raised in this case. B-162196, February 19, 1969. However, our review of all these protests found them to be substantially without merit. Also, we have issued a report covering several allegations by Corbin concerning the Navy's procurement of receivers, wherein we found several procedural weaknesses in the Navy's product - approval testing methodology. Review of the Procurement of Nitrogen Receivers for Sidewinder Air-To-Air Missiles, B-162196, July 25, 1968. Again, however, we found no evidence of acts by the Navy tending to damage the integrity of the competitive bid system.

Although Corbin has again raised questions regarding the propriety of the Navy's past procurement procedures for receivers, these allegations will not be considered within the context of this protest since they concern actions which do not directly relate to this procurement. It is our view that the merits of Corbin's present timely protests must be judged solely on the basis of facts and circumstances surrounding the instant procurement. Hy-Gain Electronics Corporation, B-180740, December 11, 1974, 74-2 CPD 324. Moreover, we do not think it serves any useful purpose to consider pursuant to our Bid Protest Procedures

the alleged impropriety of actions which have occurred in the past regarding procurements long since completed, even if the protester believes that the alleged improprieties have just come to light. This is in keeping with the purpose of our Bid Protest Procedures, which is to secure the resolution of protests when some meaningful relief may be afforded. 52 Comp. Gen. 20 (1972). Accordingly, we must decline to consider in this decision the propriety of the Navy's past procurements of nitrogen receivers.

Corbin next contends that Varo was permitted to change its bid after bid opening. In this connection, the record indicates that the IFB solicited offers on two bases: one which included compliance with first article approval requirements and one which contemplated waiver thereof. Bidders were encouraged to submit alternate bids on both bases if possible. Varo submitted a unit price of $490.28 if first article testing was waived and $570.28 with first article testing. Varo subsequently extended its bid acceptance period to October 14, 1974, only as to its unit price offer of $570.28. Award was made to Varo on October 11, 1974.

We are aware of no legal basis on which to disqualify Varo's bid as a result of the manner in which its bid was extended. While Armed Services Procurement Regulation (ASPR) § 2-404.1 (c) (1974 ed.) directs contracting officers to request an extension of the bid acceptance period should administrative difficulties delay award beyond previously established bidders' acceptance periods, the Government has no enforceable right to an extension, and it does not relinquish any right or benefit in accepting an extension of only part of the bid. B-177504, January 23, 1973. Therefore, as in the cited case, a bidder is free to extend its bid as to only part of its original offer if not otherwise precluded by the terms of the IFB, and the Government, generally, may accept the extended offer if deemed to be the most advantageous to the Government under the solicitation. Moreover, we are advised by the Navy that first article testing has not been waived on Varo's contract. Accordingly, Varo's unit price offer of $490.28 would not have been available for acceptance in any event.

The protester also asserts that the contracting officer was inconsistent in his treatment of bidders in that he rejected the apparent low bid as nonresponsive for failure to insert information in its bid while the same deficiency in Varo's bid was allegedly overlooked.

The IFB as initially issued provided that the supplies were to be inspected at origin, delivered FOB destination, and accepted at destination. Clause I-927 of the IFB, "Inspection at Origin and Acceptance at Destination", required bidders to insert information

as to whether the articles were to be furnished from stock or from Government surplus material, the name of the principal manufacturer of the articles and the address of the plant at which the articles were to be inspected prior to shipment. Bidders were cautioned: "The information requested by this clause is required for bid evaluation purposes. Failure to furnish such information may result in rejection of the bid as nonresponsive."

Two amendments to the IFB were issued. The first amendment changed the terms of delivery to FOB origin, deleted clause I-927 and substituted therefor clause I-926 "Inspection and Acceptance at Origin." Clause I-926 was very similar to clause I-927 except that clause I-926 provided that acceptance would occur at origin rather than at destination. The second amendment changed one of the applicable drawings called out by the specifications.

The apparent low bidder, MKB Manufacturing Corporation, failed to acknowledge receipt of the two amendments and its bid was rejected as nonresponsive. Varo and Corbin acknowledged the two amendments and inserted information in clause I-927 initially contained in the IFB, but both failed to respond to three of the same questions contained in clause I-926 which superseded clause I-927. Corbin's argument is that if MKB's bid was nonresponsive for failure to insert information in clause I-926, Varo's bid was also nonresponsive. The protester offers no explanation as to why its own bid would not also be nonresponsive if its rationale were accepted.

We do not believe Varo's bid was required to be rejected for failure to respond to the three questions contained in clause I-926, since the requested information was in fact contained in Varo's answer to clause I-927 and was submitted as part of its bid. While this information was not placed in the proper part of Varo's bid, this discrepancy can be waived as a minor informality since it has no real effect on the competition. ASPR § 2-405 (1974 ed.). Moreover, MKB's bid was rejected not because it failed to respond to these three questions but because it failed to acknowledge the two amendments to the bid. Since there is no indication that the amendments did not contain some material changes to the IFB, such as the substitution of specification drawings, or that MKB did in fact receive the two amendments, we cannot object to rejection of its bid.

Corbin's final argument concerns the method by which the Navy procures these receivers. Corbin believes that in the future the receiver should be produced as a qualified products list (QPL) item (see ASPR Section I, Part II (1974 ed.)) and be furnished to the manufacturer of the Sidewinder missile launcher. Corbin contends that this method of procurement would encourage competition and would eventually be more cost-effective for the Navy. The Navy advises that its present first article testing requirement for receivers is sufficient for the qualification of these units and that in its opinion the initiation of a QPL requirement (which is generally restrictive of competition) is unnecessary. Further, the Navy comprehends no savings or other benefits that would result from such a separate procurement of nitrogen receivers.

While the contracting agencies are vested with discretion to determine the Government's needs and how best to satisfy them, their exercise of discretion is subject to review by this Office. However, our review is predicated on a timely protest against a procurement which allegedly is being improperly conducted. In the absence of a timely protest against the method of receiver procurement, Corbin's position is premature for consideration by this Office.

In view of the above, the protest must be denied.

Deputy Comptroller General
of the United States