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A. Gallagher
Proct

DECISION



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

FILE:

B-190136

DATE: March 7, 1978

MATTER OF:

McIntyre Engineering Company, Inc.

DIGEST:

1. As agency recognizes, information after bid opening indicating manufacturer's product listed on Qualified Products List (QPL) may not fully comply with specification calls for further investigation to determine whether product should be retained on QPL. However, bids by manufacturer offering without exception to furnish product in compliance with specification are responsive.
2. Whether contract performance will comply with specification is matter relating to affirmative determination of bidder's responsibility and to contract administration. GAO does not review affirmative determinations of responsibility in absence of showing of fraud or allegations that definitive responsibility criteria in solicitation were misapplied, and contract administration is function of contracting agency.

This is our decision on a protest by McIntyre Engineering Company, Inc. (McIntyre), concerning awards for the furnishing of certain cooling coils and cooler units to Colmac Coil Manufacturing, Inc. (Colmac), under the following solicitations: No. N00140-76-R-1711 (issued by the Naval Regional Procurement Office, Philadelphia, Pennsylvania), No. N00102-76-R-2683 (Portsmouth, New Hampshire Naval Shipyard) and Nos. N00104-77-B-0720, -0820 and -0902 (Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania). The protester alleges that Colmac's product did not meet the requirements for inclusion on the applicable Qualified Products List (QPL 2939-11) and that Colmac's bids were therefore nonresponsive.

Background

Awards were made under solicitations -1711 and -2683 in January and February 1977. Deliveries under the contracts apparently have been completed or are well on their way to completion. The issues raised by the protester are basically the same as to these procurements and as to the awards made under solicitations -0720, -0820 and -0902 in September 1977. We believe it would not be particularly useful to consider the issues in the context of the two procurements which have essentially been completed. Accordingly, we will discuss the issues with reference to the facts of the three most recent procurements.

Solicitations -0720, -0820 and -0902 were formally advertised. Bids were received in July 1977, with Colmac's being low and McIntyre's second low in each instance. McIntyre then protested to the contracting officer that Colmac had never submitted drawings for approval and that the fin width and tube spacing of Colmac's product did not comply with the applicable specification.

The contracting officer states that there was no requirement that Colmac drawings be approved as part of the qualification procedure. However, in connection with the preaward survey of Colmac he was advised by a Government representative that certain Colmac drawings which had been examined clearly showed that the fin width and tube spacing were not identical in all respects with the specification. The contracting officer determined that Colmac's bids did not take any exceptions to the specification requirements in this regard. He then queried Colmac and received a written statement from the low bidder that it would meet all dimensional requirements. The Naval Ship Engineering Center (NAVSEC) also confirmed that Colmac had met the test requirements for inclusion on the QPL.

The contracting officer states that based on the foregoing he determined that Colmac was the low, responsive, responsible bidder, and therefore proceeded

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with the awards. He also sent a message to the Defense Contract Administration Services Management Area, Seattle, Washington, requesting careful monitoring of the contracts to assure strict compliance with applicable specifications and drawings.

Protester's Position

The protester points out that section 3.1 of the applicable specification (MIL-C-2939D (SHIPS)) provided that the product furnished shall have passed the qualification tests and shall have been listed on or approved for listing on the applicable QPL. The specification further provided that the product shall be examined and measured to verify compliance with the requirements of the specification, and it described as one possible defect a product not being in accordance with applicable drawings. Further, paragraph 3.6.1.1 of the specification stated that physical dimensions, mounting dimensions, tolerances and tube spacing shall conform to certain described drawings.

McIntyre contends that Colmac's product was neither examined nor tested in accordance with the specification. Further, the protester alleges that if a proper examination and testing had been conducted, it would have shown that the Colmac product did not meet minimum requirements in that (1) its fin width was only 10.39 inches, not 11.5 inches as specified, and (2) it did not meet the tube spacing requirement of 1.5 inches. McIntyre believes that as a consequence Colmac's unit has substantially less capacity than required by the specification. Moreover, the protester alleges that because Colmac's nonconforming product uses less material, Colmac could have offered a bid price substantially less than bidders offering conforming products. The protester contends that in bidding its conforming product it was, accordingly, unfairly disadvantaged in the competition.

Agency's position

In its December 13, 1977, report to our Office, the Naval Supply Systems Command (NAVJUP) maintains that since Colmac met the qualifications for inclusion on the QPL and has agreed to furnish a product fully compliant with the specification, the protest should be denied. In addition to the contracting officer's statement, supra, the report included a November 29, 1977, letter from NAVSEC with the following information concerning the qualification testing:

"Colmac * * * has met the procedural requirements and did satisfy the qualification test requirements for inclusion on [the QPL]. Qualification requirements do not require drawing review or approval as a prerequisite for qualification testing. However, it does require an examination of the test sample submitted for qualification testing. The examination would be conducted by the local Government inspector where the plant is located. Since NAVSEC received no comments from the Government Inspector along with the test report, it was assumed that the examination revealed no non-conformance with the specification requirements. On these bases qualification approval was granted.

"Our investigation into the subject protest revealed that Colmac * * * had failed to request the required examination prior to shipping the test sample to the laboratory conducting the qualification tests. It also revealed that the local Government Inspector had examined coils of identical construction from the production run which the test sample had been

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taken. The width of the fins and spacing of the tubes went unnoticed as not meeting specification requirements. It is questionable whether by inspecting a person could determine the fin width and tube spacing meet or do not meet specification requirements after a coil has been assembled.

* * * * [Subsequent to October 25, 1977]
a copy of Colmac drawings has been received and reviewed by this Center. The cooling coils depicted on the received drawings do not comply with * * * [the specifications] as to the width of the fins or to the spacing of the tubes. In each case there has been a reduction from that specified * * * When the fin width is reduced and the tube spacing is not in accordance with specification requirements, the product would normally have less capacity. In the case of the Colmac product, the test revealed no reduction in the single point capacity specified in the specification. The product may satisfy the single point capacity in the specification but not necessarily the capacities at other conditions. Extensive testing would be required to determine whether the product would meet other capacity points at various conditions.

"Further investigation will be conducted by NAVSEC to determine whether Colmac * * * should be retained on QPL-2939 * * *."

Protester's Response

The protester interprets the information in the agency's report as an admission by NAVSUP that the protest is meritorious. Specifically, McIntyre maintains it is apparent that examination of the Colmac product was required as part of the qualification procedure, that no such examination was conducted, that the product did not and does not meet the specification requirements concerning fin width and tube spacing, that in consequence the product will have less capacity, and that it is therefore absolutely clear that the units delivered by Colmac under any resulting contracts will not meet the contract specification.

Discussion

In 40 Comp. Gen. 352 (1960), a firm's product was qualified under a specification which had been relaxed in certain respects, and the firm later bid in accordance with the specification as it had been changed during the qualification procedure. In these circumstances, we held that the agency properly concluded that the bid was nonresponsive and we did not object to the agency's decision to cancel and resolicit. In 49 Comp. Gen. 224 (1969), we considered a protest alleging that a firm had been wrongfully allowed to qualify its nonconforming product. Essentially, the protester argued that the production product had not received the testing required for qualified products listing. We noted that listing on a QPL indicates that at the time of qualification the manufacturer has the ability to make a product meeting the specification requirements, and is not a substitute for strict compliance with the specifications in the performance of a particular contract. We further noted that while serious questions had been raised because there was information indicating that a component of the product which was qualified was dissimilar from the corresponding component in the production item, * * * [T]he fact remains that the Ellinor Corporation was placed on the Qualified Products List of tow target manufacturers, and until

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removed therefrom, or until requalification is required, is eligible to submit bids or proposals on tow target procurements." 49 Comp. Gen., supra, at 229. We therefore denied the protest concerning the awards of two negotiated contracts to Ellinor.

In the present case, after Colmac's product had been placed on the QPL by NAVSEC and bids had been opened under the solicitations, information obtained by the Navy from certain Colmac drawings--drawings which were not required to be approved as part of the qualification procedure--indicated that the product as shown in the drawings is not in compliance with the specification as to its fin width and tube spacing. As noted supra, NAVSEC recognizes that this information calls for further investigation to determine whether Colmac should be retained on the QPL. Cf. Armed Services Procurement Regulation § 1-1110 (1976 ed.).


However, Colmac was on the QPL at the time bids were submitted in the present procurements, and examination of the Colmac bids indicates that Colmac offered without exception to furnish a product in compliance with the specification. Contrary to the protester's contention, Colmac's bids were therefore responsive. Contrast 40 Comp. Gen., supra, 50 id. 691 (1971) and 52 id. 142 (1972).

The question whether Colmac will furnish a product in conformity with the specification in the course of its performance of the contracts relates to the contractor's responsibility and to matters of contract administration. As previously noted, the contracting officer made an affirmative determination of responsibility and also took steps to assure monitoring of the performance of the contracts. Our Office does not review affirmative determinations of responsibility in the absence of a showing of fraud or allegations that definitive responsibility criteria in the solicitation were

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misapplied. There has been no such showing here. See, generally, ENSEC Service Corporation, 55 Comp. Gen. 494 (1975), 75-2 CPD 341. It is also well established that matters of contract administration are the function of the contracting agency.

In view of the foregoing, the protest is denied.


Deputy Comptroller General
of the United States

