

PR

91-1 CPD 303



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

Decision

Matter of: East West Research, Inc.
File: B-243224
Date: March 19, 1991

Richard Snyder for the protester.
Donald Tracy, Esq., Defense Logistics Agency, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest contending that firm submitting low quotation was ineligible for award is dismissed where protester submitted the fifth-low quotation and is, therefore, not an interested party because it would not receive an award even if its protest were sustained.

DECISION

East West Research, Inc. protests the issuance of a purchase order for abrasive wheels to Toledo Abrasive and Supply Company under request for quotations (RFQ) No. DLA400-90-T-8090, which was issued by the Defense Logistics Agency (DLA) as a small business-small purchase set-aside. The protester also claims entitlement to bid preparation and protest costs.

We dismiss the protest and deny the claim for costs.

The RFQ included the clause set forth at Federal Acquisition Regulation (FAR) § 52.219-4 which, among other things, required products to be manufactured or produced by domestic small businesses. Toledo submitted the low quotation but offered to supply foreign abrasive wheels. Nine other firms, including the protester, submitted quotations; East West's quotation was fifth-low and none of the intervening quotations was, on its face, based on supplying foreign products.

DLA reports that it issued a purchase order based on low price to Toledo in the amount of \$1,090.50 on November 2, 1990, despite the fact that the firm proposed to supply foreign products. The agency further reports that on January 15, 1991, Toledo shipped the abrasive wheels and that the government accepted them. When East West discovered that Toledo had received the award, it filed a Freedom of

Information Act request on January 23; on February 5, DLA provided the firm a copy of the purchase order. East West then filed a protest with DLA contending that Toledo was ineligible since its quotation was based on supplying foreign products.

DLA concedes that, at this point, the contracting officer discovered that the purchase order had been issued in error and so advised East West in a letter dated February 20 denying the agency-level protest; in the same letter, DLA further advised the protester that the contract had already been fully performed.

East West protested to our Office on March 8, contending that the issuance of Toledo's purchase order violated the terms of the RFQ, requesting its cancellation and the resolicitation of the requirement, and further claiming entitlement to bid preparation and protest costs. On March 13, DLA requested us to summarily dismiss the protest on the basis that East West is not an interested party since the firm submitted the fifth-low quotation and was, thus, never in line for award; the agency also submits that the forms of relief requested by the protester--cancellation of the purchase order and resolicitation of the requirement--are not feasible because the contract has been fully performed.


Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551 (1988), only an "interested party" may protest a procurement by a federal agency. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of, or failure to award, a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1990). Generally, a protester which is fifth in line for award is not considered an interested party to object to an award to the low bidder or offeror since the protester would not become the awardee if its protest were sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

While in some cases our Office will consider a party that is not next in line for award to be an interested party for the purpose of protesting, those cases generally involve protests against defects in the solicitation or the competition itself so that if the protest were sustained the requirements might be resolicited and the protester afforded a further opportunity to compete; here, however, despite the fact that the protester argues that the requirement should be resolicited, the protest itself does not involve such a defect--it is merely a challenge to the particular award made. When we sustain protests such as this, the appropriate remedy, where that remedy is possible, is consideration of the quote or

offer from the party next in line for award, not resolicitation. State Technical Institute at Memphis, 67 Comp. Gen. 2364 (1988), 88-1 CPD ¶ 135. (The relief sought by East West-- termination of the award and resolicitation--would not be granted in any event since the contract has been completely performed.) Thus, under the circumstances, the protester is not an interested party for the purposes of challenging the award to Toledo.

East West's lack of status as an interested party is not changed by the fact that, on March 18, the protester filed a response to the agency's request for dismissal in which it alleged for the first time that one intervening offeror intended to supply a foreign product and that two others could not make a profit at the prices they quoted if they did not supply foreign products. With regard to the firms which have submitted intervening offers which East West considers to be too low, such an allegation is not sufficient to make the protester an interested party since we have no legal basis to object to the submission or acceptance of below-cost quotations. See Sterling Servs. Inc.--Recon., B-239046.2, July 30, 1990, 90-2 CPD ¶ 82.

The protest is dismissed. The claim for bid preparation and protest costs is denied since we are dismissing the protest and not issuing a decision on the merits. Harbert Int'l, Inc., B-236864.3, Mar. 30, 1990, 90-1 CPD ¶ 343.


Ronald Berger
Associate General Counsel