DOCUMENT RESUME

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[Qualification of Bidder as an Approved Source for Defense Procurement]. B-187798. May 12, 1977. 5 pp.

Decision re: Axel Electronics, Inc.; Tobe Deutschmann Labs.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Department of the Air Force.
Authority: 55 Comp. Gen. 1066. 55 Comp. Gen. 1069. A.S.P.R. 3-805.3(c). B-187406 (1977).

Each company contended that it should get the contract award. Axel and Deutschmann were the only two offerors on the solicitation, with Deutschmann submitting the low bid. The conflict centered on whether Deutschmann could qualify as an approved source for this procurement as required by the solicitation. The offeror should be considered as an approved source where the Air Force technical personnel approved the offeror subject to the addition of a first article test provision to the contract. Relaxation of the delivery terms during negotiations with only one of the two offerors was improper, and a new round of negotiations was recommended. (Author/SC)

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H. Hoffman
Proc. D.

DECISION

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

FILE: B-187798 DATE: May 12, 1977

MATTER OF: Axel and Deutschmann

DIGEST:

1. Offeror should be considered as approved source where Air Force technical personnel approved offeror subject to addition of first article test provision to contract. Technical approval was contingent not upon successful completion of first article test but only upon inclusion of first article clause in contract.

2. Relaxation of delivery terms during negotiations with only one of two offerors was improper and should be corrected by new round of negotiations with both offerors even though offeror's price was exposed to competitor by nongovernmental source.

Axel Electronics, Inc. (Axel) and Tobe Deutschmann Laboratories (Deutschmann), respectively protest, each contending that it should receive award by the Department of the Air Force (Air Force) under Request for Proposals (RFP) 42600-76-R-A243. Axel and Deutschmann were the only offerors on this solicitation for a quantity of radar pulse form networks as replacement parts in support of F-4 series aircraft. Deutschmann submitted the low offer.

Briefly, the conflict centers on whether Deutschmann could qualify as an approved source for this procurement as required by the solicitation. Clause D-5 of the RFP, Required Source Approval, states in pertinent part as follows:

"a. The source(s) listed above have been approved by the Government for supply of the spare/component parts called for herein in order to assure the requisite safe, dependable, effective operation in support of military equipment. Offerors other than the below listed approved source(s) will NOT be considered for award under this solicitation UNLESS:

* * * * *

"(4) The offeror submits prior to or concurrent with its proposal such complete and current engineering data for the item(s) (including manufacturing control drawings, qualification test reports, quality assurance procedures, etc.) as may be required for evaluation purposes to determine the acceptability of the item as supplied by your firm for Government use.

"b. Offers based on the submittal of approval information in accordance with paragraph (a) hereof MAY, as determined by the Contracting Officer, be considered for award under this solicitation ONLY IF:

"(1) The evaluation of such offers is practicable and in the Government's interest considering the availability of resources and cost to the Government for the qualification of new sources for the required item(s) as well as the advantages anticipated to be derived by the Government as a result of such qualification; AND,

"(2) The Government can, in fact, determine that the item, as supplied by your firm, is acceptable for Government use; AND,

"(3) In all cases, the evaluation/verification of the submittal and the requisite approval and award thereon can be made in time to meet the Government's requirements."

Only Axel and Westinghouse Electric Corporation (Westinghouse) were listed as approved sources. Deutschmann, seeking to qualify under subparagraph (a)(4), made available to the Air Force Westinghouse drawings and performance specification, certifying that it had full legal rights in this data. Upon examination of these documents, the Air Force engineering staff concluded that Deutschmann had the data needed to manufacture the item, and advised that "[b]ased on our review of all the information which Tobe Deutschmann supplied we will approve them for the manufacture of this item subject to the attached first article requirements" (requiring Government approval of the first unit delivered by Deutschmann prior to full production).

The contracting officer then proceeded to negotiate with Deutschmann to include first article requirements in the contract. In addition, he negotiated a revised delivery schedule with Deutschmann. In this regard, the RFP as issued called for delivery of all items in 100 days. Deutschmann offered to meet this delivery while Axel offered 150 days delivery. Because of the first article testing, the contracting officer agreed with Deutschmann to allow delivery of units in increments with complete delivery 285 days after award.

The contracting officer acknowledges that Axel was excluded from the negotiations, but believes that the factual circumstances surrounding the case at hand justified the exclusion. After the initial proposals were received, Axel advised the contracting officer of Deutschmann's price. The contracting officer was informed that Axel learned of its competitor's price from a source other than the Government. Under the circumstances, the contracting officer felt that a call for revised offers from both offerors would be unfair to Deutschmann. On the other hand, he concluded that it would not be unfair to exclude Axel from the negotiations since it had "improperly" obtained Deutschmann's price and, moreover, Axel's initial offer did not meet the initial delivery schedule. Accordingly, the contracting officer proposes to make award to Deutschmann based on the revised delivery schedule and the inclusion of first article requirements in the contract.

Axel and Headquarters, Air Force, join in opposing award to Deutschmann. Both believe that Deutschmann's offer is not acceptable under the terms of clause D-5, quoted above, because the offeror is not an approved source. Headquarters argues that the language of the clause envisions approval of sources prior to award, not after award and subsequent approval of first article. Regarding the reported disclosure of Deutschmann's price, Headquarters finds that apparently the price has been compromised but that the Air Force "has not been party to such compromise." Since, however, Headquarters believes that negotiations with Axel for delivery remain feasible and Deutschmann's offer was not acceptable under the terms of the RFP clause, it recommends that the Axel protest be sustained and Deutschmann's protest denied.

With respect to the requirements of clause D-5, we see no conflict between source approval and a contract requirement for first article testing. Subparagraph (a)(4) of the clause provides for "qualification of new sources" if the contracting officer can

determine on the basis of the data submitted by a potential new source that the item offered is acceptable. It is not disputed that Deutschmann possesses the necessary data to manufacture the item being procured. Moreover, the Air Force engineering staff considers Deutschmann to be qualified. If, as Headquarters argues, clause D-5 envisions that newly approved sources should not be required to undergo first article testing after award, the clause does not so indicate. Subparagraph 5(d) of the clause provides, however, that the listing in the solicitation of an approved source does not constitute a predetermination of responsibility or ability of the listed source to perform on the particular contract. If even a previously approved source is not necessarily deemed to have the ability to perform, it seems reasonable to us that source approval may be made contingent upon inclusion of a first article clause in the contract. See ERA Industries, Inc., B-187406, May 3, 1977, 77-1 CPD __. To this extent, we sustain Deutschmann's protest.

The remaining issue is whether Axel was justifiably excluded from the award negotiations. The contracting officer gives two reasons for his action: (1) unfairness to Deutschmann if Axel were allowed to compete against Deutschmann after learning Deutschmann's price, and (2) the fact that Axel did not offer to meet the original delivery schedule. With respect to point 2, we agree with Headquarters, Air Force, that it is feasible to negotiate delivery with Axel. Although Axel did not offer delivery within 100 days as initially required by the RFP, its offer of delivery within 150 days indicates that meaningful negotiations on delivery could be conducted with Axel since the contracting officer is now willing to accept complete delivery in 280 days from an offeror subject to first article testing.

The first point raises a more serious problem. As the contracting officer states, Axel is aware of Deutschmann's price and for that reason would have an advantage in any competition. Since the contracting officer believed that Axel improperly obtained its competitor's price, he excluded Axel from the negotiations in order to preserve the integrity of the competitive system. We agree with the contracting officer that the integrity of the competitive system should be preserved. In our opinion this should not be accomplished by automatically excluding Axel from the competition. Apparently Axel did not obtain its information from Government sources, and we believe that neither the contracting officer nor this Office should judge whether Axel properly or improperly obtained the information

from another source. Moreover, even where the Government improperly has revealed a competitor's proposal, the remedy has not been to exclude from further competition an offeror which obtains the improperly disclosed information. Rather, we have recommended that the party to whom information was improperly revealed be permitted to participate in the competition provided that it acquiesce in a similar disclosure of its proposal. TM Systems, Inc., 55 Comp. Gen. 1066, 1069 (1976), 76-1 CPD 299. The justification for subordinating the prohibitions of auction technique imposed by ASPR § 3-805.3(c) stems from the primacy of the statutorily imposed requirements for competition. In our opinion such procedure provides the fairest overall solution where the improper disclosure is admittedly the Government's fault. However, if as in this case, the Government is not responsible for the disclosure, the parties should be left to compete without any attempt by the Government to equalize the footing of the parties. In the circumstances we are unable to determine whether it would be fair to insist that offerors bare their prices as a prerequisite for continuing in the required competition and in such circumstances complete openness could unjustifiably compound the auction technique prohibited by ASPR § 3-805.3(c).

Accordingly, we recommend that the agency conduct another round of negotiations with both offerors.

R. F. Keller

Deputy Comptroller General
of the United States