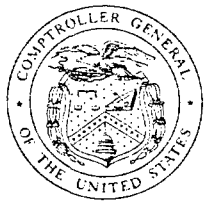
Zelkowitz
PL II

DECISION



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

15253

FILE: B-198022 DATE: October 22, 1980

MATTER OF: Security Assistance Forces & Equipment International Inc.

DIGEST:

1. Protest over award of contract by Army for NATO is subject to GAO bid protest jurisdiction since use of appropriated funds are initially involved and procurement is therefore "by" an agency of the Federal Government whose accounts are subject to settlement by GAO.

2. Protest alleging deliberate exclusion of potential bidder is denied where protester fails to affirmatively prove that agency made deliberate or conscious attempt to preclude potential bidder from competing.

Security Assistance Forces & Equipment International Inc. (SAFE) protests the award of a contract to Gebr. Weimer Gmbh by the U.S. Army Contracting Agency, Europe (USACAE) under Request for Proposals (RFP) DAJA37-80-R-0113. SAFE alleges that USACAE committed a civil rights violation by failing to send SAFE a copy of the solicitation until after the submittal date had passed. SAFE also contends that its offer would have been lower than the awardee's had it been provided an opportunity to submit a timely offer.

The contract is for the purchase of steel bar window grills and doors for the Central Army Group (CENTAG) of the North Atlantic Treaty Organization (NATO). USACAE has advised us that the purchase is being funded initially from a Department of the Army appropriation which will be reimbursed by CENTAG.

As a preliminary issue, the Army raises the question of whether we have jurisdiction to consider protests concerning NATO procurements. Our Bid Protest Procedures

~~012572~~
113608

provide for our consideration of protests by interested parties of the proposed or actual award of a contract, or the award of a contract "by or for an agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office." 4 C.F.R. § 20.1(a) (1980) (emphasis added). Recently we took jurisdiction over protests concerning procurements conducted pursuant to the Arms Export Control Act (formerly the Foreign Military Sales Act), 22 U.S.C. § 2751 et seq. (1976), where the Department of Defense (DOD), acting for a foreign government, directly enters into an agreement with a contractor and initially uses its own funds to accomplish the transaction. Procurements Involving Foreign Military Sales, 58 Comp. Gen. 81 (1978), 78-2 CPD 349. The involvement of the USACAE in this procurement is essentially identical to the involvement of DOD in Foreign Military Sales Act transactions to the extent that appropriated funds are used at least initially. Consequently, we believe the involvement of USACAE in this procurement is sufficient to constitute a procurement "by * * * an agency of the Federal Government * * *." 4 C.F.R. § 20.1(a) (emphasis added).

Pursuant to a request from NATO for the procuring of steel bar window grills and doors, the Army mailed RFP DAJA37-80-R-0113 on December 12, 1979 to six firms on its bidders list. SAFE was not one of the six firms to receive the solicitation. Closing date for receipt of proposals was set for January 9, 1980.

In a postscript to a letter directly addressed to the Commander, USACAE, dated December 14, 1979, SAFE requested a copy of the solicitation. SAFE did not request the solicitation from the contracting officer, nor did its representative attempt to obtain a copy from the procurement office, although he resided nearby and could have done so. The Commander, replying to SAFE in a letter dated January 8, 1980, stated that SAFE was not listed on its records as a firm providing the types of items required by this solicitation. Nevertheless, SAFE received a copy of the requested solicitation on January 14, five days after the closing date for receipt of proposals.

On January 15, SAFE protested to the Army concerning the failure of the Army to send SAFE a copy of the solicitation until after the closing date for receipt of proposals.

SAFE alleged that this act was just one of several similar deliberate actions on the part of the Army to exclude SAFE from participating in this and other procurements. To remedy this particular wrong, SAFE requested that the submittal time for the contract be extended, thus affording it the opportunity to submit an offer.

The Commander, USACAE, in a reply to SAFE dated February 22, acknowledged that SAFE should have been sent a copy of the solicitation immediately following his receipt of SAFE's request dated December 14. He stated further that:

> " * * * I have found no evidence that any of the SAFE companies have requested to be placed on the Bidder's List for construction items or is a current producer of steel bar grills for doors or windows. * * *
>
> " * * *[M]y reply to SAFE International, Inc.'s letter of 14 Dec 1979 was not a conscious or deliberate attempt to preclude [SAFE] from making an offer to subject RFP. Instead of having the Contracting Officer provide the RFP directly to you in response to your Post Script, I requested that it be forwarded to me for incorporation into my response * * *. Regrettably my reply to you was delayed due to staffing coordination and Christmas and New Year Holidays during which the Agency was closed and/or personnel were on * * * leave.
>
> " * * *However, in order to reduce the number of occasions in which you assert that your firms are not placed on original source lists for those supplies and services for which they are interested in making offers, I reiterate my request that your companies maintain their Bidder's Mailing List applications in a current status. * * *
>
> "I further recommend that should an occasion arise wherein one of your firms is not solicited * * * you make your request for the particular RFP to the responsible Contracting Officer [who] is best situated to promptly dispatch * * * the requested RFP * * * if a copy is available. * * * It is

USACAE's routine practice * * * to send * * * an RFP, if available, to any firm * * * upon request. * * *"

Not satisfied with this response from the Army, SAFE protested to our Office.

Inadvertent actions of an activity which preclude a potential bidder from competing on a procurement do not constitute a compelling reason to question an award if there is no evidence of a deliberate or conscious attempt to preclude the potential bidder from competing and competition resulted in an award at a reasonable price. Intermountain Sanitation Service, B-193239, January 19, 1979, 79-1 CPD 33; Valley Construction Company, B-185684, April 19, 1976, 76-1 CPD 266. In the instant case, SAFE does not contend that competition was inadequate or that the contract was awarded for other than a reasonable price. SAFE only asserts, after the fact, that if it was able to participate in the procurement, it would have made a lower offer than that of the awardee. Moreover, since SAFE's assertion that the Army deliberately attempted to exclude it from participating in the procurement was only substantiated by references to alleged similar actions by the Army, which were never proven, and since the Army not only emphatically denied these contentions but offered a plausible explanation for its actions, SAFE has not met its burden of affirmatively proving its assertion. Crestwood Furniture Company--Reconsideration, B-195109.3, January 21, 1980, 80-1 CPD 59; Introl Corporation, B-194570, January 15, 1980, 80-1 CPD 41. We believe that the record here amply demonstrates that most of SAFE's difficulties in this procurement resulted from its own actions--the manner in which the request was made, its incomplete bidders list application, its failure to attempt to personally obtain a copy of the RFP--rather than as a result of anything that the procuring activity did.

Finally, we do not believe the allegations raised here concerning a corporate firm's exclusion from a procurement properly may be viewed as involving civil rights violations.

The protest is denied.

Shelton J. Boolan

For the Comptroller General
of the United States