

Protest of) Date: March 11, 1992
BURLINGTON BIO-MEDICAL)
& SCIENTIFIC CORP.)
)
)
Solicitation No. 197101-91-A-0921) P.S. Protest No. 91-87

DECISION

Burlington Bio-Medical & Scientific Corp. ("Burlington") timely protests its rejection as a nonresponsible offeror under Solicitation No. 197101-91-A-0921 for dog repellent spray. The protester also challenges the award of the contract to ARI, Inc. ("ARI"), contending that ARI should also have been found to be nonresponsible.

The Contracts Branch of the National Inventory Control Center in Topeka, KS, issued the solicitation on July 30, 1991, with an offer due date of August 28. The solicitation sought 1,025,280 cans of Postal Service [P.S.] Item No. S2025, dog repellent, packaged in 1 1/2 ounce aerosol containers. Section M.1 of the solicitation stated that award would be made "to the responsible offeror who submits an acceptable offer in compliance with solicitation terms and conditions and the lowest offer price."

Clause OB-64, Scope of Contract, found at section B.2 of the solicitation, stated that "The Dog Repellent shall be manufactured in accordance with Specification USPS-D-734B (ESC), dated November 17, 1988." Section 3.3.1 of the specification states: "The repellent shall consist principally of oleoresin capsicum in a solution of mineral oil. The active ingredient, capsaicin, concentration shall be 0.35% by weight of the liquid contents, with a plus or minus 10% tolerance." Each can of repellent was to be labeled with directions for use: "Spray stream into face of attacking dog to prevent dog bite. Will immediately repel and subdue dogs when sprayed into face and eyes. Direct application must be made. The effective range of the dog repellent is up to 10 feet." (Specification section 3.6.2.)

Clause 2-3, Quality Assurance, stated that the "contractor's inspection system must be in accordance with Specification MIL-I-45208, INSPECTION SYSTEM REQUIREMENTS, of the issue in effect on the solicitation date." The solicitation gave notice to offerors in Section K.12 of the solicitation that pre-award surveys might be conducted.

Offers were received from Burlington and ARI. Burlington's offer was lower than ARI's by \$.07 per can. Under Section A.1 of its proposal, where Burlington had entered its unit and extended prices, it had added the following: "Capsaicin based dog repellents are considered painfully discomforting for dogs, cats etc. Animal activist groups object to its use. As an alternate we offer Ropel packaged in the same type of aerosol container. See attached data sheet."

The data sheet described an "animal, rodent, and bird repellent" with the trademark name "RO-PEL." The literature asserts that "[t]he vilest, most bitter substance ever discovered is combined into a special solvent system which allows it to penetrate into the bark of trees and the surface of many other objects, and to remain, despite rain, snow, dust, wind, dirt or other atmospheric conditions." The literature described RO-PEL as available in containers of various sizes, all larger than the 1-1/2 ounce containers specified.

The contracting officer made inquiry of Burlington whether its alternate product could be furnished in the specified containers. Thereafter, by letters dated October 3, the contracting officer conducted written discussions with Burlington and ARI and requested their best and final offers. The letter to Burlington noted, in part:

[I]t appears by the statement [following section A.1 that] you are submitting an alternate offer which does not comply with the . . . specification. . . . It is imperative that the specifications be complied with. Previous correspondence from your company h[as] stated you could comply with the packaging specifications and [that] the only difference would have been the chemical composition. Therefore, your assurance is needed that your product does comply fully with the specifications. Unless you can give this assurance, your offer may be determined to be unacceptable.

Burlington's response was to state: "Product will comply with specifications. Our alternative was for a superior product. Final choice is yours." The contracting officer concluded that Burlington's proposal was technically acceptable.

To assist the contracting officer in making a determination of Burlington's responsibility, a pre-award survey was scheduled for

October 23. Following the pre-award survey, the quality control manager ("QCM") prepared a report recommending that no award should be made to Burlington because it was deficient in three areas. First, the QCM found that Burlington did not have a quality control program in accordance with MIL-I-45208. The QCM states that during his visit, he "was not shown any evidence that [Burlington had] any type of quality system." The QCM asserts that although he requested a copy of Burlington's quality control program when he was conducting the pre-award survey, he did not obtain one because Burlington's representative was unable to locate it. Instead, Burlington's representative indicated to the QCM that another employee, who was out of town, was responsible for

the quality program and that this employee would be able to provide the required information when he returned.

The record indicates that the QCM received a quality assurance manual from Burlington sometime after October 30, but that he found it unacceptable because it was designed around a specific item: sodium phosphate dibasic. The QCM also states in his report that he checked with an employee at the Defense Contract Administration Service about Burlington's quality control capabilities and was informed by that employee that although Burlington possessed the technical capabilities to manufacture the product, it did not operate under a MIL-I-45208 system and its quality control capabilities were "doubtful."

The second reason that the QCM provides to justify his recommendation concerns Burlington's production capabilities. During his pre-award survey, the QCM asked Burlington how it planned to produce or obtain the containers, valves and cap guards needed for this contract. Burlington responded that Reliance Packaging, Inc. ("Reliance") would be supplying these items. The QCM asserts that he was shown a letter from Reliance to Burlington in which Reliance stated that it had 300,000 containers available, subject to prior sale. Reliance's letter, however, did not address the availability of valves or cap guards. The QCM states that although he asked Burlington to address the availability and delivery schedule of valves and caps for the containers, Burlington failed to provide any information on this subject.

Burlington's failure to provide information concerning the valves and caps resulted in the QCM's finding it deficient in a third area: its ability to meet the delivery schedule. The QCM found that it was unlikely that Burlington would be able to meet the delivery schedule because the caps would require a mold which could take some time to make.

Six days after conducting a pre-award survey of Burlington, the QCM conducted its pre-award survey of ARI. With respect to ARI's quality control capabilities, the QCM noted that its "[q]uality system [was] not in compliance with MIL-I-45208 for the required documentation, but the controls [were] sufficient to control this product." The QCM justified this conclusion by noting that ARI's "officer weigh[ed] every fifth container to make sure it ha[d] the correct fill, and the weight [was] documented. Each can [was also] checked in . . . warm water for leaks and all leakers [were] pulled and-not shipped." After finishing ARI's pre-award survey, the QCM recommended that ARI should receive award because its technical, production and quality control capabilities, as well as its ability to meet the delivery schedule, were satisfactory.

By letter dated November 12, the contracting officer advised Burlington that it had been found nonresponsible due to deficiencies in the three areas listed above. On November 13, the contracting officer awarded the contract to ARI. Burlington's protest letter, dated November 21, was timely received by the contracting officer on November 25, and forwarded to this office for resolution pursuant to Procurement Manual (PM) 4.5.7.

In its protest, Burlington states that although it does not have a MIL-I-45208 system in place, it does not feel that one is necessary. According to Burlington, its existing quality control system is adequate to inspect the dog repellent. Burlington alleges that if absolutely necessary, it could subcontract the inspection work to a company which has a MIL-I-45208 program.

Burlington also questions the contracting officer's finding of nonresponsibility with

respect to its production capabilities. It states that it doesn't understand how it could be found nonresponsible when one of its major customers is prepared to award it a contract for an item similar to the one that the Postal Service requested. Burlington alleges that this customer's pre-award survey was more detailed than the one conducted by the Postal Service and that the customer also required Burlington to submit samples for evaluation.

Finally, Burlington requests more information about the identity of the awardee and the price it offered.^{1/} Burlington also requests a Certificate of Competency ("COC") from the Small Business Administration ("SBA").^{1/}

In his report, the contracting officer states that to the extent that Burlington is protesting the determination that it did not have an adequate inspection system, its protest is without merit since the pre-award survey "clearly indicated that Burlington's inspection system did not meet the solicitation's requirements." As for the unsatisfactory ratings that Burlington received in other areas, the contracting officer explains that although Burlington was notified one week prior to the pre-award survey about the information which the QCM would be seeking, it did not have this information ready at the time of the pre-award survey. For instance, when Burlington was asked for an equipment list, it showed the QCM its production line. The contracting officer also claims that the QCM "did not see any method for pressurizing" during his visit even though the Postal Service's "product calls for 1-1/2 oz. containers that are pressurized."^{1/} According to the contracting officer, the only product that Burlington showed the QCM during his visit was its RO-PEL product which uses unpressurized plastic containers.

The contracting officer states that he accepted the quality control manager's observations and conclusions about Burlington's capabilities because they were reasonable and based on substantial evidence. As a result, the contracting officer argues that his determination of Burlington's nonresponsibility should be upheld. As for Burlington's claim that unlike its commercial customer, the Postal Service did not ask for any samples, the contracting officer states that the Postal Service does not obtain

^{1/} This issue is moot since the contracting officer provided this information to Burlington in a letter dated November 26.

^{2/} Burlington's request for a Certificate of Competency from the SBA invokes the procedure by which the SBA, acting pursuant to the authority of the Small Business Act, 15 U.S.C. ' 637(b)(7)(A) (1988), may make binding determinations of the competence of small business contractors who have been initially found nonresponsible by federal agency contracting officers. The Certificate of Competency procedure is not available with respect to postal procurements. "Determinations of the SBA are not binding upon the Postal Service as the Postal Service has been specifically excluded from the definition of the term 'Federal Agency' in the statutory provisions from which the SBA derives its authority." J.T. Construction Co., Inc, P.S. Protest No. 90-59, February 22, 1991. Accordingly, its request is unavailing.

^{3/} The pre-award survey report suggests that the QCM saw a method for pressurizing the containers during his pre-award survey since the QCM noted in his report that Burlington "has an automated piece of machinery to fill, cap and pressurize the containers."

samples during the pre-award stage. Samples are only accepted during first article testing after award of the contract.

In supplementary comments, Burlington suggests that ARI should not have been found to be responsible since it too lacks a MIL-I-45208 system. Burlington reasserts that it offered to send its test samples to an outside firm such as New York Testing or U.S. Testing who have the MIL-I-45208 system. Concerning its produc-

tion capabilities, Burlington states that although it was producing standard non-pressurized bottles of Ropel Garbage Protector at the time of the pre-award survey, its equipment is capable of handling both types of filling and it has two subcontractors ready and able to accommodate it in the event its facility is unavailable. Burlington claims that samples of the pressurized animal repellent were shown and offered to the quality control manager, but he declined to accept them. As a last point, Burlington realleges that if needed, its affiliate, Reliance had 300,000 empty containers available which it could furnish to Burlington. According to Burlington, it offered to visit Reliance with the QCM, but he said he didn't have time.

In response to a request from this office for additional information, the contracting officer addressed Burlington's allegation that ARI should have been found to be nonresponsible because it did not have a MIL-I-45208 system. The contracting officer explains that although ARI was not in full compliance with MIL-I-45208, it demonstrated during its pre-award survey that it had "complete control over the process in manufacturing," by testing each can for leaks, weighing every fifth container to make sure it has the correct fill, and maintaining the required documentation. Burlington, on the other hand, did not demonstrate that it had any of these procedures during its pre-award survey. The contracting officer also notes that Burlington's quality control manual was inadequate because "it did not apply to the product being procured [but] was designed around a specific item."

As for the protester's contention that it could have subcontracted the testing to a company with a MIL-I-45208 system, the contracting officer states that in order to have an effective quality control system, "a program must be in place to inspect the product as it is being manufactured." The contracting officer explains that after the initial testing has taken place, the containers can then be sent to an off-site laboratory for additional testing. Finally, the contracting officer adds that he based his determination that Burlington was nonresponsible upon "other factors" besides its quality control system.^{4/}

Discussion

The Procurement Manual (PM) states that "[c]ontracts may be awarded only to responsible prospective contractors" and that "[t]o qualify for award, a prospective contractor must affirmatively demonstrate its responsibility" PM 3.3.1 a. In order to be determined responsible, a contractor must, inter

alia, be able to comply with the required performance schedule (PM 3.3.1 b.2.), have a sound quality control program that complies with solicitation requirements or the ability to obtain one (PM 3.3.1 b.5.), and have the necessary production equipment and facilities, or the ability to obtain them (PM 3.3.1 b.7.). "In the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility. " PM 3.3.1 e.1.

The standard by which this office reviews a contracting officer's determination that an offeror is nonresponsible is well settled:

^{4/} We can only assume that the contracting officer is referring here to the unsatisfactory ratings that Burlington received on its production capabilities and its ability to meet the delivery schedule.

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based upon substantial information.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; Innovative Sales Brokers, Inc., P.S. Protest No. 89-41, August 31, 1989; Jindal Builders and Restoration Corporation, P.S. Protest No. 90-10, April 19, 1990.

In this case, the contracting officer based his determination of nonresponsibility on the QCM's findings at the pre-award survey. "When the decision of the contracting officer is based on the judgment of technical personnel, the protester must show that such judgment was fraudulent, prejudiced, or arbitrary and capricious." Year-A-Round Corporation, P.S. Protest No. 87-12, June 12, 1987. "The contractor bears the heavy burden of proving that either the pre-award survey was inaccurate or the resulting responsibility determination was unreasonable." Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988.

The first issue concerns Burlington's quality control program. Burlington alleges that its quality control system was adequate to inspect the dog repellent, but offers no evidence to support its allegation. The QCM who conducted Burlington's pre-award survey states in his report that he did not see any quality control programs in place during his visit. He also states that the quality control manual which Burlington later submitted was inadequate because it did not apply to the product being procured and was designed around a specific item, sodium phosphate dibasic. Despite Burlington's avowals to the contrary, the contracting officer's conclusions with respect to Burlington's inadequate quality control program were reasonable. Burlington's mere disagreement with the positions taken by the contracting officer and his technical representatives cannot justify overturning their determinations. Kingsway Cranes & Conveyors and Stewart Glapat Corporation, P.S. Protest No. 86-01, April 14, 1986.

In its comments, Burlington claims that even if it did not have the required quality control system, it could have subcontracted the inspection work to one of two firms in New York who had the MIL-I-45208 system. The contracting officer's determination that it would not be feasible for Burlington to comply with the quality control requirements by sending the containers for testing to an outside laboratory was not arbitrary or unreasonable. Based on the record before us, the contracting officer was justified in rejecting Burlington as nonresponsible because of its deficient quality control system.

The second reason asserted by the contracting officer to justify his determination of nonresponsibility is Burlington's inadequate production capabilities. PM 3.3.1 b.7. requires the prospective contractor to have the necessary production equipment and facilities or the ability to obtain them. Burlington claims that its likely award of a contract for a similar item from a customer who conducted a more detailed pre-award survey proves its responsibility. Burlington also contends that although it was producing a non-pressurized product at the time of the pre-award survey, it showed the QCM

samples of animal repellent in pressurized containers which it had produced for another client. Contract performance on another contract is an element of a responsibility determination only insofar as that performance is applicable to the solicitation under review. See OSM Corporation, P.S. Protest No. 88-36, August 18, 1988; Fairfield Stamping Corporation, supra.

In this case there is not enough evidence in the record for us to determine whether the contract to which Burlington refers is for an item similar enough to the one being solicited. In the absence of evidence from the protester proving its allegations, "we must afford the judgment of technical personnel a presumption of correctness." DEA-MAR Corporation, P.S. Protest No. 85-21, June 21, 1985. The fact that Burlington showed the QCM samples which were manufactured for another client does not require that it be found responsible in the face of other evidence supporting Burlington's nonresponsibility. See OSM Corporation, supra. Burlington has not submitted any documentation which would indicate that it could produce or obtain the valves and caps needed for this contract.

Given Burlington's failure to supply the information about the availability and delivery schedule of the caps, it was reasonable for the QCM to conclude that Burlington might not have the capability to meet the delivery schedule set out in the solicitation. Having received a request for this information, it was Burlington's duty to supply it. Year-A-Round Corporation, supra. An offeror's "failure to provide information uniquely within its purview justifies a finding of nonresponsibility if the information available to the contracting officer from other sources is insufficient to affirmatively establish the [offeror's] responsibility." Express by B & M, P.S. Protest No. 91-02, February 12 1991.

Each of the three items cited by the QCM and relied upon by the contracting officer for his determination of Burlington's nonresponsibility is, by itself, sufficient grounds upon which to base a finding of nonresponsibility. See Kingsway Cranes & Conveyors and Stewart Glapat Corporation, supra; Year-A-Round Corporation, supra. On the record before us, the protester has not met its burden of showing the unreasonableness of the contracting officer's determination in all three areas, and we must therefore uphold that determination.

We do, however, question the validity of the contracting officer's determination that ARI was responsible. On review, a contracting officer's affirmative finding of responsibility will not be disturbed in the absence of fraud, abuse of discretion, or failure to apply definitive responsibility criteria. Georgia Power Company, P.S. Protest 90-01, February 14, 1990; Gage Constructors, P.S. Protest No. 87-11, July 13, 1987. The record in this case, however, supports the protester's contention that the contracting officer abused his discretion by finding ARI responsible in spite of the fact that ARI did not have a quality control system in compliance with MIL-I-45208. If the contracting officer determined that it was not necessary for contractors to comply with the MIL-I-45208 specification and that a less stringent quality control system would be adequate, it should have amended the solicitation, sent a copy of the amendment to all prospective offerors that received the solicitation, including Burlington and ARI, and extended the due date for proposals. See PM 4.1.2 i.3.

Despite the error committed by the contracting officer, we cannot sustain Burlington's protest. Even if the contracting officer had amended the solicitation and found that

Burlington's quality control system complied with the less stringent requirement, Burlington would have still been found nonresponsible due to its deficient production capabilities and its inability to meet the meet the delivery schedule. Under these circumstances, we cannot grant any relief to Burlington.

The protest is denied.

[Signed]

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 5/15/95 WJJ]