

Mr. Notopoulos
14258 PL II

DECISION



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

FILE: B-195196; B-195196.2 DATE: July 10, 1980

MATTER OF: Security Assistance Forces and
Equipment International, Inc.

DIGEST:

1. [Protest of alleged solicitation impropriety] concerning requirement for placement of lines in conduit must be filed prior to closing date for receipt of initial proposals in order to be timely. 4 C.F.R. § 20.2(b)(1). Where such protest was timely filed with contracting agency, and agency received offers as scheduled without deleting requirement from solicitation, protester was placed on notice of adverse agency action and had to file any subsequent protest to GAO within 10 working days thereafter. 4 C.F.R. § 20.2(b)(2).
2. Provision in Army's solicitation for procurement in Europe of technical services for European facilities, which provided that logistic support (financial assistance available only for foreign personnel brought into European country) would not be granted, and Army's restriction of solicitation to firms located within Federal Republic of Germany (FRG) including protester's FRG affiliate, was not unduly restrictive of competition where contracting officer determined that there existed adequate competition within FRG so that Army was not required to incur expenses incident to providing logistic support.
3. Record does not substantiate protester's assertion that issuance of subsequent solicitation for similar services to be performed at another

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site (not a follow-on RFP), which did not contain protested provisions of this solicitation, constitutes vindication of protest.

4. Rejection of sole offer, submitted by protester, and consequential cancellation of solicitation was proper where protester took deliberate exception in its offer to mandatory solicitation provision.
5. Where protester's offer was properly rejected, protester may not receive proposal preparation costs.
6. Protest allegations that awardee's price was unrealistically low and that preaward survey was inadequate will not be considered since in essence they challenge affirmative determination of responsibility which GAO does not review except under circumstances not herein involved.

This protest involves issues intertwined with request for proposals (RFP) No. DAJA37-79-F-0246 (0246), which was canceled, and a subsequent solicitation, RFP No. DAJA37-79-R-0526 (0526), both of which were issued by the U. S. Army Procurement Agency, Europe, for the installation, activation and inspection of intrusion detection alarm systems in military arms rooms in the Federal Republic of Germany (FRG).

Security Assistance Forces and Equipment International, Inc. (SAFE) has protested various provisions of each RFP as restrictive of competition, and further protests that the rejection of SAFE's sole offer under

0246 and the cancellation of that RFP were improper. SAFE requests that our Office order that solicitation reinstated and a contract awarded to SAFE or, in the alternative, that SAFE be awarded proposal preparation costs. SAFE further contends that the issuance of 0526, which did not contain the two protested provisions of 0246, must be accepted as vindication of its contention that 0246 was restrictive of competition. Finally, SAFE questions the award of a contract under 0526 to an offeror whose price SAFE considers unrealistically low.

Solicitation 0246

This solicitation, as amended, specified July 6, 1979, as the due date for receipt of proposals. On June 20, 1979, our Office received a timely protest from SAFE against a single solicitation provision which SAFE considered restrictive of competition. That provision stated that logistic support would not be provided under the ensuing contract. As defined by applicable regulations, logistic support is that which, under appropriate circumstances, is furnished to civilian contract personnel not ordinarily resident in the host country and who meet various other specified conditions, and includes financial assistance for items such as transient quarters, dependent schooling, military commissary and postal services, medical and dental services, etc. SAFE contended that failure to offer this support restrained competition from American contractors who could otherwise be in a position to furnish attractive offers, and cited other purported advantages which would inure from the availability of logistical support for prospective U. S. offerors.

By letter dated June 26, 1979, SAFE protested to the contracting agency against the inclusion in the solicitation of a requirement that cable runs within the buildings must be placed "in conduit." SAFE argued that a Data Transmission System provides the cable run with a protected circuit and was therefore considered by SAFE as not requiring installation in conduit. SAFE considered the requirement to entail greater expense

without furnishing any additional protection to the system.

The contracting agency took no action in response to either of SAFE's allegations, and received offers as scheduled on July 6, 1979.

Although the Army had solicited a number of firms, all of which were incorporated or registered in the FRG, the sole offer received was submitted by SAFE with a cover letter stating it required logistic support for a total of six individuals and that its offered price did not include wall borings for placing the cable in conduit because of SAFE's position that this was unnecessary. However, SAFE parenthesized the costs for such tasks if they were to be performed. In that cover letter, SAFE stated that if a contract were awarded to it, including logistic support and excluding the requirement for lines to be installed in conduit, its protests would be withdrawn.

On September 10, 1979, the contracting officer determined that SAFE's offer should be rejected and the solicitation canceled because SAFE's offer was conditioned, contrary to solicitation requirements, upon the receipt of logistic support and exclusion of the cable from placement in conduit.

By letter of September 12 to the contracting officer, SAFE advised that it had just attended a presolicitation conference for an upcoming, urgent procurement action (0526) for installation of this type of equipment in another area, wherein it had been purportedly established that conduit was not required for lines between the protected areas and logistic support was not precluded. It was SAFE's position that its protest under 0246 had thereby been sustained.

By letter to the Army dated September 14, 1979, SAFE expressed its assumption that it was in the interests of both parties to complete negotiations and execute a contract prior to the end of the fiscal year (September 30, 1979). SAFE therefore offered to premise its

request for logistic support upon three rather than six individuals and, in consideration therefor, offered to reduce its price by \$5,250.

By letter of September 17, 1979, received by our Office on September 25, 1979, SAFE reiterated its position that its earlier protest concerning RFP 0246 was vindicated by the issuance of 0526 containing no requirement for enclosure of lines in conduit and containing no express prohibition against the granting of logistic support in exchange for consideration. In that letter, SAFE also protested the rejection of its offer and the cancellation of 0246, contending that such action was arbitrary in view of subsequent developments.

SAFE's protest of the provision in 0246 requiring placement of cable runs in conduit is untimely. Our Bid Protest Procedures require that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or closing date for receipt of initial proposals must be filed prior to such date. 4 C.F.R. § 20.2(b)(1) (1980). The term "filed" means receipt in the contracting agency or the General Accounting Office as the case may be. While the record shows that SAFE evidently filed a timely protest against the conduit requirement with the contracting agency, our Procedures require that if a protest is initially filed with the contracting agency in a timely manner, a subsequent protest to our Office must be filed within 10 days of when the protester learns of initial adverse agency action on the protest. In this instance, the crucial date for SAFE was July 6, 1979, when the Army received offers without having deleted the conduit requirement. That action constituted notice of adverse agency action on SAFE's protest. See Picker Corporation; Ohio-Nuclear, Inc., B-192565, January 19, 1979, 79-1 CPD 31. Therefore, SAFE had 10 days in which to protest the conduit requirement to this Office. 4 C.F.R. § 20.2(b)(2). However, SAFE's first correspondence to this Office referring to the conduit requirement was a letter we received on September 19, 1979. Consequently, this issue is untimely filed and ineligible for consideration on the merits.

With regard to the solicitation provision denying logistic support, the Army explains that the concept of individual logistic support had its genesis during the initial post-war period in the European Theater when many contract services could not be provided by local (European) contractors or by U.S. Government personnel, and it was necessary to encourage qualified individuals (primarily U.S.-based contractor personnel) possessing these skills to work in Europe by offering benefits similar to which they were accustomed in their homelands.

The contracting officer reports he made a determination, based upon the past availability of these services within the FRG, that individual logistical support would not be provided and that there was no necessity to solicit sources outside the FRG. He reports that the installation and maintenance of alarm systems is certainly not unique to American technology, and that a contract for the installation and maintenance of 66 similar systems was awarded by the contracting agency to a German firm in late 1976. The contracting officer concluded that there therefore was no necessity to incur the additional administrative and financial burdens incident to providing logistic support.

DAR § 3-101(b) specifies that where supplies or services are to be procured by negotiation, offers shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured. However, procuring agencies are vested with a reasonable degree of discretion to determine the extent of competition which is required consistent with the needs of the agency, and this Office has upheld restrictions on competition when their use was adequately justified so as not to impose any undue restrictions on competition. See Ikard Manufacturing Company, B-192248, B-192748, B-194585, August 29, 1979, 79-2 CPD 161, and discussion within. We believe that the contracting officer reasonably exercised his discretion in soliciting only firms located in the FRG and in prohibiting logistic support in view

of the agency's determination that the financial burden of logistic support was not needed to insure an adequate number of responses.

Since no offers were received from German concerns under 0246, the absence of competition was investigated. It was determined that the firms with installation capability did not have the capacity during the requirement period, and that several firms indicated a desire to restrict their efforts to installation of equipment which their firms had manufactured. A further review developed a new source list including six FRG firms which were considered to have the capability and capacity to perform in the immediate future, and the subsequent receipt of offers from five FRG concerns under 0526, with a very favorable price from the low offeror, persuades us that there was a reasonable basis for the contracting officer's determination of the availability of adequate competition on the local (FRG) market that would obviate the necessity of incurring the financial costs incident to the offering of logistic support. We therefore find a reasonable basis for the prohibition of logistic support in 0246.

In addition, we are unconvinced that SAFE International was genuinely prejudiced by the protested provision or that it was unduly restricted in its competition for the prospective award since the contracting agency solicited SAFE's German affiliate, SAFE OHG. It would therefore appear that an offer could have been submitted by SAFE's German affiliate, which shared the same competitive posture as all the other solicited German firms with regard to eligibility for logistic support.

We cannot accept SAFE's contention that the issuance of 0526, without an express prohibition of logistic support and absent a conduit requirement, constituted a vindication of its protest allegations under 0246. RFP 0526 was not a resolicitation of 0246; while the equipment to be installed was the same, the environment and requiring agencies were different. The Army advises that unlike 0246, the site at which the equipment was to be installed under 0526 was such that the continuity of data transmission lines could be guaranteed without the need to

install conduit between buildings. It is further reported that 0526 did not address the availability of logistic support since only German firms were solicited and the furnishing of logistic support was not contemplated. In this regard, it was again determined that the technical expertise required to install the systems was not such that American technicians would have to be imported from the United States. Moreover, the Army asserts that the omission of reference to logistic support should not be construed as an indication of its availability.

Since the Army has justified to our satisfaction the prohibition in 0246 concerning logistic support, we must further conclude that the rejection of SAFE's offer was warranted. This is not an instance of an inadvertent nonconformity in SAFE's proposal susceptible of correction in any subsequent negotiations; instead, the record indicates a deliberate exception by SAFE to a mandatory solicitation provision of which it was fully cognizant. It is well established that a deviation from a mandatory solicitation provision of which a protester was aware will result in rejection of its offer as unacceptable. See State Mutual Book and Periodical Service, Ltd., B-191008(2), April 3, 1978, 78-1 CPD 264; Alpha Industries, Inc., B-189081, April 27, 1978, 78-1 CPD 325; Neshaminy Valley Information Processing, Inc., B-194286.2, September 14, 1979, 79-2 CPD 199; AM International, Inc., AM Varsity Division, B-195082, January 3, 1980, 80-1 CPD 11. Accordingly, we concur in the rejection of SAFE's offer under 0246, and in the consequential cancellation of that solicitation.

Parenthetically, we note that even if we had found the logistic support provision to be without a legitimate basis, and that it unduly restricted competition (which we do not in this instance), we do not believe it would have been proper for the Army to waive that provision and negotiate the terms of logistic support with SAFE; rather, the procurement would have to be resolicited to permit competition from other American or non-European firms that might otherwise have submitted offers but for the restriction at issue. See System Development Corporation, 58 Comp. Gen. 475 (1979), 79-1 CPD 303.

Concerning SAFE's claim in the alternative for proposal preparation costs, where our review of the record reveals a rational basis for the rejection of a protester's proposal, a protester may not recover proposal preparation costs since it cannot demonstrate that the agency has acted arbitrarily or capriciously in evaluating its proposal. / See Genasys Corporation, B-190504, September 11, 1978, 78-2 CPD 182. That is the situation here.

Solicitation 0526

Solicitation 0526, as amended, specified a proposal due date of September 24, 1979. SAFE, by letter of September 20, 1979, protested to our Office, alleging that the solicitation was improper in that it:

- 1) was restricted to German firms;
- 2) did not permit the installation to be made according to American electrical codes; and
- 3) with the exception of two items, required the use of German materials without an "or equivalent" designation.

The Army states that it sent RFP 0526 to five German-registered firms including SAFE's German-registered affiliate (SAFE OHG), and received offers from five firms, including SAFE which tendered its offer in the name of its United States corporate entity, SAFE International. SAFE's offer of \$158,328 (or 277,074 Deutschemarks (DM) at the 1.75 exchange rate in effect on September 24, 1979) was the highest received, and considerably in excess of the low offer of 97,740 DM submitted by Taylor Elektroinstallations GMBH (Taylor), a British concern registered in the FRG. The record indicates logistic support was neither requested by, nor considered for, Taylor because its employees are ordinarily residents of the FRG and not employed exclusively in support of U. S. Forces. Taylor was requested to

examine its offer for a possible mistake, and Taylor twice confirmed its price on both September 25 and September 27.

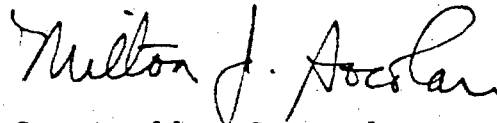
On September 28, 1979, the contracting agency determined to make a prompt award notwithstanding SAFE's protest, as permitted by DAR § 2-407.8(b)(3), citing the advantages to the Government in bringing the security of 36 military arms rooms to an acceptable level and thereby releasing military personnel from 24 hour guard duty. Pursuant to a favorable preaward survey which had been performed on Taylor the previous day, the contract was awarded on September 28, 1979.

On October 17, 1979, this Office received a letter from SAFE dated October 9, 1979, protesting that Taylor's offered price was unrealistically low and expressing reservations as to the adequacy of the preaward survey. SAFE requested that the award be terminated and the procurement resolicited. It also contended that the contracting agency has not developed a set-aside program for small, minority or "women-owned" businesses.

SAFE did not send its letter of September 20 directly to this Office as required by our protest procedures. Instead, it addressed the letter to us "through" the Army Procurement Agency, Europe. The Army forwarded the letter to us. Although the Army received the letter prior to the closing date for receipt of proposals, the letter arrived here after the closing date for receipt of proposals. Consequently, each allegation contained in that letter, plus the later complaint that the solicitation should have been issued as a set-aside for small, minority or "women-owned" businesses, are untimely raised under the provisions of 4 C.F.R. § 20.2(b)(1), which we have previously discussed, and will not be considered. See National Designers, Inc., B-195353, B-195354, August 6, 1979, 79-2 CPD 86.

Neither will we consider SAFE's allegation that the successful offeror's price was unrealistically low and its belief that the preaward survey, resulting in an affirmative determination of that offeror's responsibility, was predicated upon an inadequate investigation. Regardless of SAFE's suspicion that Taylor's confirmed price may have been unrealistically low, we have held that even if a low offeror were to incur a loss at its price, this would not justify rejecting an otherwise acceptable offer. To properly reject an offer as being extremely low would require a determination that the offeror was nonresponsible. See A.C. Electronics, Inc., B-185553, May 3, 1976, 76-1 CPD 295. In essence, SAFE's allegations regarding the preaward survey and Taylor's low price are directed to the affirmative determination of responsibility. This Office does not review protests of affirmative determinations of responsibility, however, unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been met. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Data Test Corp., 54 Comp. Gen. 499 (1974), 74-2 CPD 365; RKFM Products Corporation, B-190313, August 7, 1978, 78-2 CPD 94. Since the affirmative determination of Taylor's responsibility is not challenged on the basis of fraud or alleged misapplication of definitive responsibility criteria, SAFE's objection will not be further considered.

The protest is dismissed in part and denied in part.]



For the Comptroller General
of the United States