



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

B-178285

SEP 18 1973

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Jacob H. Fischman, Esquire
100-03 70th Avenue
Forest Hills, New York 11375

Dear Mr. Fischman:

Reference is made to your letter dated June 28, 1973, and prior correspondence, on behalf of Camp Systems Incorporated (Camp), protesting the award of a contract to Technology Incorporated (Technology) under solicitation No. CG-31,108-A, issued by the United States Coast Guard, Department of Transportation.

The solicitation, issued on October 19, 1972, covered a negotiated procurement for the development of a computer planned aircraft maintenance system for Coast Guard C-130 aircraft, including the monitoring and maintenance of the developed system with from sixteen (16) to twenty-one (21) participating aircraft. Four of the six proposals received were found to be technically acceptable and, of these, Camp's offer was the highest submitted. The Report of Review (required by DOT Order 4200.12) dated March 14, 1973, found Technology to be the lowest responsible offeror and concluded that the proposed award to that firm was justified. Therefore, Technology's proposal was accepted.

The solicitation required the submission of a "Management and Technical Proposal" independent of the "Cost Proposal," with the warning that failure to comply with this format "may result in a determination of nonresponsiveness." In this respect, paragraph (a) (page 4) entitled "Management Portion" stated:

"* * * Proposals shall include a statement of the history and experience of the contractor relating to his ability to meet the requirements of the proposed contract. The proposal shall include a resume for key personnel to establish the system and to conduct training. Prospective contractors should be experienced in operation of computer monitored aircraft maintenance systems and should have had for at least one year a capable staff of management and technical writers who have demonstrated from a composite point of view, experience with both military and civil aircraft maintenance systems."

[Protest of Coast Guard Contract Award]

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B-178285

The primary basis of Camp's protest is that this provision made previous operating experience of a computer monitored aircraft maintenance system a mandatory prerequisite for every offeror seeking to submit a proposal. Regarding the ability to meet the requirements of the proposed contract, you maintain that because of the specialized nature of such systems, years of experience in related work are not equivalent to having experience in the operation of computer monitored aircraft maintenance systems. Since its experience was apparently in data collection systems, you argue that Technology was neither a responsive nor a responsible bidder unless it had experience in the operation of at least two computer monitored aircraft maintenance systems and also had a complete staff with at least one year's experience with both military and civilian aircraft systems.

The principal authority cited in support of your position is our decision in B-165292, November 6, 1968 (48 Comp. Gen. 291), regarding an advertised procurement in which the experience provisions were related to " * * * proven reliability under actual operating conditions." In this regard you state that:

"In the subject solicitation there is an admonition that failure to supply the experience data 'may' result in a determination of non-responsiveness. In B-165292 supra, the meaning of the admonition is the same when it says 'failure to do this "may" be reason for determining bid to be non-responsive.' Also in B-165292 the bid said the desired information 'must' be submitted with the bid. In this protest, the solicitation said as to experience 'Proposals shall . . . ' (See above for full quotation.) Thus, for all practical purposes, this protest and B-165292 are similar in that the experience requirements go to responsiveness."

However, our review of your citations and arguments regarding the issue of responsiveness reveals that your position is based on the principles applicable to "advertised" rather than "negotiated" procurements. In a negotiated procurement, "nonresponsiveness" is originally considered to be a subject of negotiation. 51 Comp. Gen. 249, 250 (1971). With respect to the extent of negotiations, we have stated that unless initially unacceptable proposals are found not subject to being made acceptable, except through major revisions, prospective contractor's should be afforded an opportunity to satisfy the requirements of the Government. 51 Comp. Gen. 431 (1972).

Nevertheless, it appears that Technology's proposal was fully responsive to the terms of the solicitation. We interpret the experience requirements in this case as placing emphasis upon the offeror's

capability to fulfill the requirements of the solicitation to the satisfaction of the Government and not upon the performance history or reliability of an existing system. The use of the word "should" in the "Management Portion," supra, did not create a mandatory condition but merely expressed a Government preference for prior experience, which would be one of the factors employed in the evaluation of offers. See 52 Comp. Gen. _____ (B-177220, May 14, 1973). In this regard, the solicitation included the following information:

"EVALUATION CRITERIA

"Proposals will be evaluated on the basis of the following criteria. The percentages reflect approximately divisions of the total effort each proposer should devote to his technical proposal and reflect the Coast Guard's subjective opinion as to each area's worth. The detailed evaluation criteria employed will utilize these weightings.

"a. Corporate Capability, Management and Experience (30%). Each offeror's past performance and experience in similar or related work will be evaluated.

"b. Technical Personnel (30%). The creativity and competence of the technical personnel assigned to this project will be judged. This evaluation will be based on education, general background, experience in similar projects, percentage of time to be devoted to this project and status within the proposer's organization. The depth of interest of the project manager in the specific field will also be considered under this section.

"c. Sample Data (40%). Evaluation will be made with regard to clarity, organization, and general layout of all required sample data."

The solicitation did not require rejection of any proposal as being nonresponsive from those offerors lacking the preferred prior experience. Rather, the mandate was that the experience data be furnished with the proposal. Technology complied with this requirement.

A determination of whether or not an offeror is capable of performance and therefore is responsible is necessarily a matter of judgment. 43 Comp. Gen. 228, 230 (1963). We have consistently held that we will not question the validity of discretionary judgment absent a showing of bad faith or lack of any reasonable basis for the determination. Our review of the record has uncovered no basis upon which we might properly conclude that the contracting officer acted unreasonably or in bad faith in finding Technology responsible.

B-178283

Camp has further alleged, that based on its own cost experience, the price submitted by Technology for item 1 of the solicitation is unrealistically low and that the firm could not meet its full requirements within the price submitted. Our Office does not accept the premise upon which this argument is based because it seems to be no more than an assertion that Camp's estimate of development costs must be accepted as the standard of realism. We note that Camp's price for this item was also the highest received.

Finally, it is contended that this procurement makes use of a system which is proprietary to Camp. In this regard, you allege that the solicitation reflected the understanding between Camp and the Coast Guard that the firm's proprietary rights in its unsolicited proposal of April 1972 would be relinquished if the subject solicitation stated that companies responding to it "must" be experienced in the field of computerized aircraft maintenance programs. The record reveals that by letter dated May 15, 1972, Camp advised the Coast Guard that its unsolicited proposal did not contain proprietary information. We find no evidence to support the allegations of any agreement to restrict the solicitation. Moreover, since it is apparent that Camp was aware of this issue upon receipt of the solicitation but delayed taking action until prior to the proposed award, any protest with respect to proprietary information must be regarded as untimely.

Accordingly, the protest is denied.

Sincerely yours,

E. H. Morse, Jr.

For the Comptroller General
of the United States