

DOCUMENT RESUME

03511 - [A2593721]

[Allegations of Nonresponsibility, Misleading Statements, and Improprieties in Solicitation]. B-189070. September 14, 1977. 3 pp.

Decision re: Sun Lab. Systems; 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: Tyndall AFB, FL; Dwain Fletcher Co.

Authority: 54 Comp. Gen. 66. 54 Comp. Gen. 499. 54 Comp. Gen. 715. 4 C.F.R. 20.2(b) (1).

The protester questioned its competitor's responsibility for operation of an audio-visual service center, alleged that statements of Air Force personnel made at a pre-proposal conference were misleading, and contended that the solicitation was deficient. The protest was denied because: GAO does not review agency determinations of responsibility; allegations of misleading statements were not supported by the record; and the protest to alleged improprieties in solicitation was untimely. (HTV)

3721
03611

DECISION



R. Bongio
F. E.

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

FILE: B-189070

DATE: September 14, 1977

MATTER OF: Sun Laboratory Systems

DIGEST:

1. Protest that low offeror is financially nonresponsible concerns challenge to agency's affirmative determination of responsibility and is not matter for review by GAO except in circumstances not present in instant case.
2. Allegation that statements made at pre-proposal conference by agency personnel were misleading to protester when determining proposal price is not supported by record.
3. Protest of alleged improprieties in solicitation not filed prior to closing date for receipt of proposals is untimely filed and not for consideration under GAO Bid Protest Procedures.

Sun Laboratory Systems (Sun) protests the award of contract No. F08637-77-90068 to Dwain Fletcher Company (Fletcher) by the Tyndall Air Force Base, Florida. The contract calls for the operation of an audio-visual service center.

Essentially, Sun (i) questions Fletcher's responsibility, (ii) alleges that statements of Air Force personnel made at a pre-proposal submission conference were misleading, particularly those statements which related to "current staffing," and (iii) contends that the Statement of Work (SOW) in the solicitation was deficient and ambiguous. These issues were first raised by Sun in its protest to the contracting officer on April 1, 1977, which followed notification from the contracting officer that Fletcher, on the basis of best and final offers, was in line for the award because of its lower proposed price. The contracting officer denied the protest by letter dated May 11, 1977, and Sun protested to this Office on May 12, 1977.

Sun first questions Fletcher's financial ability to handle the contract and refers to a Dun and Bradstreet report which Sun construes as indicating that Fletcher is financially incapable

B-189070

of providing the required services. The record, however, shows that the Air Force, in determining Fletcher to be a responsible prospective contractor, relied on a pre-award survey conducted by the Defense Contract Administration Services Management Area and on a separate financial report indicating Fletcher's ability to obtain necessary financing.

This Office does not review protests of affirmative determinations of responsibility, unless fraud is alleged on the part of the contracting officer or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365, affirmed 54 Comp. Gen. 715 (1975), 75-1 CPD 138. While we do consider protests involving negative determinations of a protester's responsibility in order to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of the procuring officials who must suffer any difficulties resulting by reason of a contractor's inability to perform. Here we find no indication that the responsibility determination was the result of fraud or that definitive criteria have not been applied. Accordingly, we will not consider this issue.

Sun next alleges that answers given at the pre-proposal conference by Air Force personnel with regard to the "current staffing" level of a "total of 24 military and 3 civilian employees in the 3 areas" were misleading because Sun took that response as providing an "indicator" of the scope of the work to be required. Sun categorizes the answer as misleading because the Air Force, in comparing the cost of providing the services "in-house" as opposed to contracting out for them, based its in-house cost estimate on using 21 rather than 27 employees. Sun states that it believed it could perform the work with less employees than would be used by the Government and that it was entitled to know the Air Force viewed the scope of work as such that it could be performed by 21 Government employees. Sun contends that had it been provided with an indication that only 21 Government employees would be required, it might have based its proposal on using 18 or 19 employees, as did Fletcher, instead of using 23 or 24 employees.

We find no merit to this aspect of the protest. Along with the answer about which Sun complains, potential offerors were advised that:

B-189070

"The Government does not necessarily stipulate that the number of employees currently staffed is the number of people required to perform this Audio Visual function."

They were further advised that 2 of the 27 employees were utilized in "satellite functions" which were not encompassed by the work covered by the solicitation.

The contracting officer states that this information, plus the agency's admonition to offerors to visit the installation for a "first-hand, on-the-spot observation," should have prevented any misunderstanding from arising. Nevertheless, the contracting officer reports, when it became clear from Sun's initial proposal (based on using 25 personnel) that there had been a misunderstanding, negotiations with Sun were utilized to make it clear to Sun that it had proposed an excessive number of personnel. In this regard, the contracting officer states, it was pointed out that only 19 people "were currently on hand" and that an "adequate job was being done." On the basis of this record, we are unable to conclude that the agency did anything to mislead Sun or that Sun should have been misled. Moreover, even if Sun was misled, we point out that all offerors were provided with the same information, so that it cannot be concluded that Sun was prejudiced by the agency's statement regarding current staffing.

Finally, Sun alleges that the SOW was deficient and ambiguous. Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1) (1977), provides that protests based upon alleged improprieties in any type of solicitation which are apparent prior to the closing date for receipt of proposals shall be filed prior to that date. The defects complained of clearly appear to be ones apparent prior to the closing date. Sun, however, did not raise its objection to the SOW until after Sun was informed on March 30, 1977, that Fletcher had submitted the low offer. This allegation, therefore, is untimely and not for consideration under our Bid Protest Procedures.

The protest is denied.


Deputy Comptroller General
of the United States