

Proc II

DECISION



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

9331

FILE: B-193153

DATE: March 7, 1979

MATTER OF: DOT Systems, Inc.

DIGEST:

*[Protest Alleging Noncompliance of Solicitation Requirements by Low Bidder]*

1. Geographic restriction limiting award of contract for reproduction equipment operators for agency equipment to firms located within 50 miles of procuring activity is a definitive responsibility criterion which as a minimum must be met by bidder as a prerequisite to affirmative determination of responsibility, and where, absent definition of location, bidder shows existence of office in private residence within 50 mile zone, contracting officer could properly find bidder met minimum standard.
2. Absent specific requirement in solicitation, existence of office in private home which may conflict with local zoning does not affect validity of contract and does not render location a sham.
3. Where geographic restriction does not represent agency's actual needs, restriction is unduly restrictive, but since protester, located within geographic zone, has not been prejudiced, award will not be disturbed. Recommendation is made that option for additional one year term not be exercised.

DOT Systems, Incorporated (DOT) has protested the award of a contract to T. R. Woodson and Associates (Woodson), the low bidder under invitation for bids No. DU-78-S011, issued by the Environmental Protection Agency (EPA), Research Triangle Park, North Carolina, for operator services for that activity's photocopy and binding equipment.

DOT alleges that Woodson fails to comply with two requirements set out in the solicitation:

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- 1) That the contractor provide "qualified" operators.
- 2) That the awardee be within a 50 mile radius of the procuring activity.

DOT states that Woodson satisfied the geographical requirement by having a relative residing in Durham, North Carolina establish the firm in his home, and alleges that such action constitutes a "sham" since the residence is not licensed or zoned for business purposes.

The determination of whether a proposed contractor can provide "qualified operators" for contract performance as required by the statement of work in the solicitation is a matter of bidder responsibility, and involves the general business judgment of the contracting officer. Our Office does not review protests against a contracting officer's affirmative determination of responsibility in these cases unless fraud is alleged on the part of procuring officials. See Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. Since there has been no question of fraud raised by the protester with respect to the question of Woodson's ability to provide qualified operators to perform the services required by the contract, we see no purpose in considering the matter further. However, where the question of responsibility revolves around the bidder's meeting or failing to meet certain specific and objective responsibility criteria expressed in the solicitation (such as the requirement that a bidder have facilities located within a certain area), our Office will review the determinations of the contracting officer to see if the specified responsibility criteria have been met. Yardney Electric Corporation, supra. These specific and objective criteria have been characterized as "definitive responsibility criteria", and compliance with such criteria is a necessary prerequisite to an affirmative determination of responsibility. Oceanside Mortuary, B-186204, July 23, 1976, 76-2 CPD 74.

In this case, Woodson's bid indicated that the firm was located in Greensboro, North Carolina, a city

beyond the 50 mile geographic limitation specified. Subsequent to bid opening, the contracting officer contacted Woodson and pointed out the 50 mile limitation. At that time, Woodson advised the contracting officer that he had an "established management" in Durham, North Carolina (a location within the 50 mile zone), indicating that his brother-in-law, Mr. Jones, would be responsible for the contract. The telephone number and address of the Durham location was the residence of Mr. Jones. When contacted by the contracting officer, Mr. Jones acknowledged that he was the "manager" for T. R. Woodson and Associates in the Durham area, and that if the contract was awarded to Woodson, he would handle its operation. The contracting officer accepted these representations as satisfying the geographic location requirement.

We have held that a definitive responsibility criterion, such as a geographical location requirement, must be complied with because the waiver of the requirement would be prejudicial to others who relied on the wording of the solicitation and who thereby reasonably anticipated the scope of competition for award. Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294; Oceanside Mortuary, supra. We cannot say here, however, that the 50 mile requirement was waived. The IFB did not define what was required for a firm to be "located" in the 50 mile area. Thus, whether a firm maintained or established a sufficient "presence" to be regarded as "located" in the required area was a matter within the reasonable discretion of the contracting officer. Cf., Continental Service Company, B-187700, January 25, 1977, 77-1 CPD 53; Mosler Airmatic Systems Division, B-187586, January 21, 1977, 77-1 CPD 42. We find no basis for concluding that the contracting officer abused his discretion. Moreover, although DOT speculates that the Durham location would violate local zoning requirements we point out that in the absence of a specific restriction in the IFB, that kind of conflict with local requirements would not affect the validity of the award. See, e.g., RCA Global Communications, Inc., B-191577, August 29, 1978, 78-2 CPD 150.

We are concerned, however, with the restrictive nature of the geographic limitation in this case, because it does not appear to represent the actual needs of the contracting agency. Burton Myers Company, 57 Comp. Gen. 454 (1978), 78-1 CPD 354. The purpose of the 50 mile restriction was to assure the availability of an alternate operator if required, within one hour of notification of the need therefor. This need appears to be based on the implicit requirement that the equipment to be operated by the contractor's employees is in continual operation on a daily basis during regular agency office hours, and that the absence of an operator for an extended period would impair certain agency operations. Thus the agency's actual need is to have a full complement of contractor furnished equipment operators on duty at all times to process the agency's duplicating requirements, with one hour available to the contractor to furnish an alternate operator if the regular operator is not at the worksite. This need can be satisfied by a contractor located beyond the 50 mile zone, so long as it can demonstrate the availability of alternate operators within the necessary time limitation. We do not believe that a requirement merely restricting awards to contractors "located" within the 50 mile zone necessarily satisfies the agency's needs in this respect.

Thus, in our view, the geographic limitation in this case unduly restricted firms outside the zone from competing for this award who could have otherwise satisfied the one hour requirement for alternate operators. DOT, however, does not contend that it was prejudiced by the geographic limitation, as it was located within the 50 mile zone, and was not therefor deprived of an opportunity to compete for the contract award. Absent a showing of prejudice, this Office will not disturb a contract award merely because a technical deficiency in the procurement process has occurred. Cf. Honeywell Information Systems, Inc., B-191212, July 14, 1978, 78-2 CPD 39. Nonetheless, because of the deficiency we have found in this case, we recommend that the option contained in the Woodson contract to extend the contract for an additional one year term not be exercised so that all

eligible firms will have an opportunity to compete in the near future. Any new solicitation should delete the geographic restriction as presently constituted, but if any definitive responsibility criteria are reasonably believed to be necessary, they should be drawn in a manner which reflects the agency's actual needs.

The protest is denied.

  
Deputy Comptroller General  
of the United States