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DECISION



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

[Protest of Navy Contract Award]

FILE: B-196799

DATE: August 18, 1980

MATTER OF: Planning Research Corporation
Data Dissemination Systems

DLG05 106

DIGEST:

1. Protest against agency's award of contract without conducting performance capability demonstration (benchmark test) is denied, since reasonable reading of solicitation does not require test.
2. Where matter of Service Contract Act applicability has been treated on merits in previous GAO decisions, untimely protest on same issue is not for consideration as "significant issue" under GAO Bid Protest Procedures.

Planning Research Corporation Data Dissemination Systems (PRC) protests the award of a contract to Volt Technical Corporation (Volt) under request for proposals (~~RFP~~) NO. N00123-78-R-0694, issued by the Naval Regional Contracting Office. The procurement called for computer-controlled artwork and text processing through photo composition. *DLG05107 AGC00001*

PRC has raised two bases for protest: (1) a benchmark (performance qualification) test was not conducted prior to award as required by the solicitation and as necessitated by circumstances surrounding the procurement; and (2) the solicitation was defective in that it evidenced a failure by the Navy to comply with the Service Contract Act of 1965, 41 U.S.C. § 351 et seq. (1976).

We find the first basis of protest to be without merit, and the second basis not for consideration on the merits.

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Benchmark Testing

Three firms responded to the solicitation: PRC (the incumbent contractor), Volt, and Comarco, Inc. Upon evaluation Volt, which offered the lowest total price (\$1,251,578), received the highest technical score (44.837 points out of 50). PRC's price was \$2,422,887 and its score was 42.698 points. Comarco, Inc. offered a price of \$2,427,325 and scored 41.469 points. The RFP provided that technical score and price were considered "substantially equal" in determining the successful offeror.

In a report on the protest, the Navy asserts that the RFP did not require benchmark testing as a prerequisite for award. Nevertheless, based on a desire by certain technical personnel to perform benchmark tests on Volt and Comarco before judging their proposals entirely acceptable, the Naval Supply Center placed a purchase order with PRC to secure data for such testing. However, the report further states:

"The Contracting Officer determined that requiring the benchmark test would be inappropriate under the circumstances. * * * The RFP contained both detailed instructions for submission of technical proposals and detailed evaluation criteria. Both Volt and Comarco had submitted proposals which were evaluated in accordance with the established criteria and found to provide sound technical approaches, demonstrate good understanding of the desired objectives, and which were supported by availability of qualified personnel. In Volt's case, the technical proposal was rated higher than [PRC's] * * *. The remaining determination to be made was solely that of the responsibility of the prospective contractor * * *. Sufficient information could be made available through a preaward survey without conducting any benchmark test, to make such a determination."

Accordingly, the three firms were simply requested to submit best and final offers. Neither PRC nor Volt revised

its proposal, and Comarco withdrew from the competition. A preaward survey of Volt resulted in an affirmative finding with respect to the firm's responsibility.

Basically, PRC disputes the Navy's position that the RFP did not call for benchmarking. PRC points to the following solicitation language:

"SUBMISSION OF PROPOSALS

Offerors' technical proposals must include, but not be limited to, a discussion of the following areas:

(1) Demonstration of understanding of the objectives." (Emphasis added.)

PRC asserts that it believed that the requirement for a "demonstration of understanding" called for an actual performance demonstration, i.e., a benchmark test. According to the protester, this belief was bolstered by circumstances such as the above-noted desire of some Navy technical personnel that a benchmark test be conducted with respect to Volt and Comarco, and the purchase from PRC of data which could be used to develop a benchmark test package. Furthermore, PRC submits that trade practice and the Navy's previous poor experience when not utilizing benchmark tests in procurements of this nature mandated a benchmark test in this instance.

We have held that a bidder or offeror relies on extra-solicitation information and circumstances at its own risk. See, e.g., General Exhibits, Inc., B-195957, February 25, 1980, 80-1 CPD 156. Moreover, we have stated that trade or business custom or practice may not alter the clear terms of a written solicitation. Brodart, Inc., B-195208, March 5, 1980, 80-1 CPD 173. Therefore, our review as to whether passing a benchmark test was required in this procurement will be limited to the reasonable interpretation of the language in the solicitation.

In our view, the "SUBMISSION OF PROPOSALS" clause cited by PRC cannot reasonably be interpreted as anything

more than a requirement that offerors provide written submissions addressing various technical elements of the Navy requirement. This is clearly indicated in the initial sentence of the clause which requires only a "discussion" of several listed areas; the "demonstration" of the offeror's understanding of the objectives simply is to be an element of that discussion. In this connection, the other listed areas included "Technical approach and method," "Quality assurance plan," and a description of the hardware that would be used. We do not believe that this solicitation language contemplated an actual demonstration or benchmark test to establish acceptability for award.

PRC also maintains that the following language in the "Description and Specifications" section of the RFP provides for a benchmark test as a prerequisite for award:

"The offeror will be required to accept Government Furnished Material (GFM) both classified and unclassified. The offeror is required to have a confidential security clearance for personnel and facilities, including equipment, prior to award. The offeror will be required to perform the following functions in connection with the GFM:

- "a. Computer terminal entry of text;
- b. Electronic scanning and digitization of art;
- c. Storage and retrieval of text and art on separate magnetic tapes or discs;
- d. Electronic/EDP text editing;
- e. Electronic/EDP merging of text and art in a pre-described format;
- f. EDP photo composition;
- g. Preparation of Camera Ready Copy (CRC);
- h. Preparation of 105mm original microfiche and duplicate * * *;

- i. Electronic photo composition generation of all forms * * *."

The protester stresses the fact that the section refers to "offeror" rather than "contractor" performance of functions in connection with Government furnished materials, and that the performance of these functions by an "offeror" by definition involves preaward activities. On that basis PRC concludes that the section contemplates a benchmark test before award.

We are not persuaded that this solicitation language reasonably could be read as involving a benchmark test. We believe it is clear that, with the obvious exception of a preaward security clearance requirement, this section concerns the work requirements to be performed under the contract by the awardee. The fact that the term "offeror" was used instead of "contractor" can only be viewed as less than precise drafting on the part of the agency and, when considered in the context of the entire "Description and Specifications" section in our view cannot reasonably be read to require the apparently successful offeror to perform the nine listed functions before receiving the contract award.

Accordingly, we do not agree that the RFP required successful benchmark testing of Volt, the highest technically rated and lowest priced offeror, before the firm could be awarded the contract. The protest on this issue is denied.

Service Contract Act Applicability

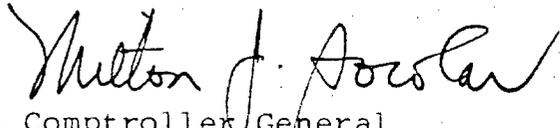
PRC argues that the primary purpose of the Navy's requirement for computerized text and artwork is the furnishing of services, and therefore that the Service Contract Act of 1965 (SCA) applies to this procurement. Since the RFP did not contain a Department of Labor wage determination for service workers, which is required in all solicitations covered by the SCA, PRC maintains that the solicitation was defective and that a resolicitation is now required. The Navy and Volt dispute PRC's characterization of the instant requirement as being primarily for services, and submit that the SCA thus is not applicable to the procurement.

The issue, raised by PRC for the first time several weeks after the closing date for receipt of initial proposals, clearly is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1980), which prescribe that protests based upon alleged improprieties in any type of solicitation which are apparent prior to the closing date for receipt of proposals must be filed before that date to be considered by our Office on the merits. Nevertheless, PRC contends that the SCA matter should be treated on the merits under the "significant issue" exception to our timeliness rules, 4 C.F.R. § 20.2(c). We do not agree.

In order to invoke our Procedures' "significant issue" exception, we have held that the subject matter of the protest not only must evidence a principle of widespread interest or importance to the procurement community, see, e.g., Willamette-Western Corporation; Pacific Towboat and Salvage Co., 54 Comp. Gen. 375 (1974), 74-2 CPD 259, but must involve a matter which has not been considered on the merits in previous decisions. CSA Reporting Corporation, 59 Comp. Gen. 27 (1980), 80-1 CPD 225.

It is unnecessary to discuss the first "significant issue" criterion stated above, because the matter of SCA applicability to a particular requirement has been addressed previously on the merits. See High Voltage Maintenance Corp., 56 Comp. Gen. 160 (1976), 76-2 CPD 473; A&C Building and Industrial Maintenance Corporation, B-193047, April 13, 1979, 79-1 CPD 265; 53 Comp. Gen. 412 (1973). Thus, we will not view the issue as "significant" under our Procedures.

This portion of the protest is dismissed.


For the Comptroller General
of the United States