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DECISION



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

[Protest Against Proposal Rejection for Lateness]

FILE: B-197174

DATE: August 25, 1980

MATTER OF: Spacesaver Systems, Inc.

~~DLG01751~~
DLG05153

DIGEST:

1. Agency is not estopped from rejecting as late proposal submitted well after closing date established by RFP where only evidence of record concerning whether agency official led offeror to believe that it could submit late proposal for consideration consists of conflicting statements of offeror and agency, since protester/offeror under such circumstances has not met its burden to affirmatively prove its case.
2. Award of contract during pendency of protest is proper where agency finds performance would be unduly delayed if prompt award were not made. However, regulations require that notice of intent to make such award be provided to GAO.
3. Whether offeror can meet requirements of solicitation requires affirmative determination of responsibility which GAO does not review unless fraud is shown on part of procuring officials or solicitation contains definitive responsibility criteria which allegedly have not been applied. Whether contractor meets requirements is matter of contract administration which is not cognizable under GAO Bid Protest Procedures.
4. Claim for proposal preparation costs is denied where there is no showing that Government acted arbitrarily or capriciously with respect to protester's proposal.
5. Legal fees incurred in pursuing bid protest are not compensable.

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Spacesaver Systems, Inc. (Spacesaver), protests the refusal by the District of Columbia General Hospital (DCGH) to consider its proposal, submitted after the time specified as the closing date for receipt of proposals under Request for Proposals (RPP) No. JB/79070, for installation of automatic filing equipment.

The RFP established 1:00 p.m., October 9, 1979, as the closing date for receipt of proposals. On October 29, 1979, and on other occasions thereafter, the President of Spacesaver, John Schmidt, contacted the DCGH Chief of Contracts and discussed the procurement and the possibility of submitting a proposal. On November 6, 1979, Mr. Schmidt hand-delivered a proposal in an open folder. On December 7, 1979, Spacesaver learned that its proposal was rejected as late. DCGH awarded the contract to Acme Visual Records, Inc. (Acme), on December 31, 1979, approximately two weeks after this protest was filed.

Although Spacesaver concedes that it submitted a proposal after the time set for receipt of proposals by the RFP, it alleges that the Chief of Contracts represented himself as the contracting officer, led it to believe that he had the authority to extend the closing date for receipt of proposals, and induced it to submit a proposal. Based upon these allegations, the protester argues that DCGH should be estopped from rejecting its proposal as late.

The contracting agency flatly disputes the protester's allegations. According to DCGH, Mr. Schmidt was never told that the closing date would be extended or that he could submit a proposal for consideration under the RFP after the established closing date. On the contrary, DCGH states, Mr. Schmidt was advised several times that his proposal, should he submit one, could not be considered. DCGH reports that it accepted the proposal as an "unsolicited proposal" which Mr. Schmidt insisted on submitting, but that it never intended to consider the proposal for evaluation under the RFP and never led Mr. Schmidt to believe that.

On this record, we cannot conclude that DCGH is estopped from rejecting the Spacesaver proposal as late. The protester has the burden of affirmatively proving its

case, and where, as here, conflicting statements of the protester and the contracting agency constitute the only evidence, the burden has not been met. Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. Thus, in the face of the agency's strong denial and the absence of other convincing evidence which supports the protester's allegations, we cannot find that DCGH induced the protester to submit a proposal and led it to believe that the proposal would be considered for award under the RFP.

Spacesaver also objects to the award to Acme during the pendency of this protest. The regulations, however, permit award while a protest is pending when the interests of the Government so require. See FPR § 1-2.407-8(b)(4). Here DCGH reports that award was made pursuant to FPR § 1-2.407-8(b)(4)(ii) because performance would be unduly delayed if a prompt award were not made. Although the regulation permits award on that basis, FPR § 1-2.407-8(b)(3) requires an agency to notify this Office of its intent to make the award. DCGH did not do so here. We are bringing this procedural deficiency to the attention of the appropriate officials.

The protester further alleges that the contractor may be unable to perform in accordance with contract requirements. Whether Acme could meet the requirements of the RFP was determined by an affirmative determination of responsibility. This Office does not review protests of affirmative determinations of responsibility unless fraud is shown on the part of the procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Aerosonic Corporation, B-193469, January 19, 1979, 79-1 CPD 35. In the present case no such allegations have been made. Moreover, whether Acme does in fact prove unable to meet contract requirements is a matter of contract administration, which is the responsibility of the contracting agency and is not cognizable under our Bid Protest Procedures. Compac-Cutting Machine Corp., B-195865, January 21, 1980, 80-1 CPD 60.

Finally, Spacesaver claims proposal preparation costs and reimbursement of legal fees. Proposal preparation costs can be recovered only if the Government

acts arbitrarily or capriciously with respect to a proposal. Keco Industries, Inc. v. United States, 492 F. 2d. 1200 (Ct. Cl. 1974); International Trade Operations, Incorporated, B-192910, April 11, 1979, 79-1 CPD 253. Since there has been no such showing, Spacesaver is not entitled to proposal preparation costs. In addition, attorneys' fees incurred in pursuing a bid protest are noncompensable. Tennessee Valley Service Company, 57 Comp. Gen. 125 (1977), 77-2 CPD 442.

The protest and claim are denied.

Harvey R. Van Cleave

For The Comptroller General
of the United States



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

B-197174

August 25, 1980

Robert Johnson, Executive Director
D.C. General Hospital
1900 Massachusetts Avenue, S.E. - Room 1456
Washington, D.C. 20002

Dear Mr. Johnson:

Enclosed is a copy of our decision of today denying the protest of Spacesaver Systems, Inc. concerning rejection of its proposal under RFP DCGH-JB/79070.

Although we have denied the protest, we bring to your attention the fact that the Hospital made award while the protest was pending without first notifying this Office, as required by the Federal Procurement Regulations.

Please remind your procurement personnel of this regulation requirement so that this procedural deficiency does not occur in the future.

Sincerely yours,

Harvey D. Van Cleave

For The Comptroller General
of the United States

Enclosure