18030

DECISION

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

FILE: B-199480 DATE: May 7, 1981

MATTER OF: Engine and Equipment Company, Inc.

DIGEST:

1. Firm which does not submit offer is "interested party" under GAO protest procedures to maintain protest of solicitation deficiencies since if protest is successful and solicitation is canceled protester would be eligible to compete under resolicitation.

2. Protester's failure to object to solicitation at preproposal conference does not negate protester's status as interested party under GAO Bid Protest Procedures.

3. Agency delay in submitting report to GAO neither justifies disregarding substantive information contained in report nor constitutes basis for sustaining protest.

4. Contention that it was improper for agency to solicit and consider proposal of contractor suspended from doing business with General Services Administration is dismissed as academic since suspended contractor did not receive award.

5. Where agency cancels IFB and resolicits requirement by RFP, changing contract type from firm fixed-price to time and materials, and incorporates certain contract provisions for purpose of alleviating financial risk to contractor in connection with acquisition of obsolete engine parts, prospective offerors have adequate basis upon which to compete intelligently, even though there remains element of financial risk in performance of contract; some risk is inherent in most types of contracts and offerors are expected to allow for that risk in formulating their proposals.

[Protest of Small Business Set-Aside Award]

115152

~~016794~~

6. Determination by Secretary of Labor to temporarily exempt engine overhaul contracts from operation of Service Contract Act is not subject to legal objection since Department of Labor (DOL) is primarily responsible for administering Act and Act permits Secretary to make exemptions.

7. Allegation that General Services Administration, not Air Force, should have solicited offers and administered contract is untimely and not for consideration since identity of contracting agency was clear from face of solicitation and allegation was not raised until after closing date for submission of initial proposals.

8. Agency's establishment of cutoff date after which information regarding prior experience would not be evaluated was reasonable although date left unevaluated 14-week period before closing date for submission of proposals; while most recent experience generally should be considered, in light of significant experience over 10-year period, sought by agency, it is not likely that prospective contractors could accumulate sufficient experience in 14-week period to significantly impact evaluation under this procurement.

Engine and Equipment Company, Inc. (EEC) protests the solicitation of proposals and award of a contract under request for proposals (RFP) No. F41608-80-R-9547, a total small business set-aside issued by the Department of the Air Force for gasoline and diesel engine overhaul services at the San Antonio Air Logistics Center, Kelly Air Force Base, Texas. EEC asserts that a suspended contractor was improperly solicited, that the RFP is ambiguous and discriminatory, and that the Service Contract Act should apply to the procurement. We deny the protest.

The Air Force initially sought to meet this requirement through a formally advertised procurement. Data deficiencies and obsolete part problems tied to the use of a firm fixed-price contract were brought to light at a prebid conference, however, and as a result, the Air Force canceled the invitation for bids in favor of a negotiated procurement. The RFP was issued May 27, 1980, providing for a time and materials type contract with a two-year base period, a 120-day extension option, and a provision allowing negotiated extensions for a third, fourth and fifth year and, if possible, conversion at that time to a firm fixed-price contract. A preproposal conference was convened June 16 and five proposals were received prior to the July 11 closing date for submission of initial proposals. Although EEC neither attended the conference nor submitted a proposal, it filed this protest prior to the closing date, challenging the procurement on several grounds.

As a preliminary matter, the Air Force suggests that because EEC did not submit a proposal or seek resolution of its objections at the preproposal conference it is not an "interested party" qualified to maintain this protest under our Bid Protest Procedures. 4 C.F.R. § 20.1(a) (1980). We think EEC is sufficiently interested. It is well-settled that a protester need not necessarily submit a proposal in order to be deemed an interested party. Fred Anderson, B-196025, February 11, 1980, 80-1 CPD 120. Whether a party is sufficiently interested depends on its status in relation to the procurement, the nature of the issues raised, and whether these circumstances indicate the existence of a direct and/or substantial economic interest on the part of the protester. Cardion Electronics, 58 Comp. Gen. 406 (1979), 79-1 CPD 406. Generally, where a nonofferor protests on the basis that defects in a solicitation warrant its cancellation and a resolicitation of the agency's requirement, and that party would be eligible for an award, the potential economic benefit to the protester is considered substantial and direct. See

de Weaver and Associates, B-200541, January 6, 1981, 81-1 CPD 6; Roy's Rabbitry, B-196452.2, May 9, 1980, 80-1 CPD 334. This is because the protester, if successful in its protest, would have an opportunity to submit a proposal under the new RFP and compete for an award. Cardion Electronics, supra. Since it appears from the record that EEC is a small business eligible for award of an engine overhaul contract, we think it has a direct and substantial economic interest in the outcome of this protest and therefore is an interested party. EEC's failure to pursue its objectives at a preproposal conference does not alter this status.

The protester initially points out that the Air Force did not submit its report to our Office within the 25 working day period established as a goal in our Bid Protest Procedures. 4 C.F.R. 20.3(c). For this reason, the protester asks that we decide the protest without considering the agency's report. We have held, however, that late submission of the report, while unfortunate, does not constitute a basis for disregarding the substantive information contained in it or for sustaining the protest. American Appraisal Associates, Inc., B-191421, September 13, 1978, 78-2 CPD 197; Wheeler Industries, Inc., B-193883, July 20, 1979, 79-2 CPD 41.

EEC's first substantive point is that it was improper for the Air Force to solicit and then consider the proposal of Midwest Engine, Inc. since that firm has been suspended from doing business with the General Services Administration (GSA). (This protest was filed prior to the closing date for submission of initial proposals: EEC's speculation that Midwest had been solicited and might submit a proposal appears to have been based on the fact that Midwest had attended the preproposal conference. It appears from the Air Force's comments that Midwest did submit a proposal which was eventually evaluated along with the others.) EEC expresses concern that award will be made to Midwest contrary to the general Governmental interests underlying GSA's suspension order. Since, as noted, award has been made to Melton's, not to Midwest, the question whether Midwest's proposal should have been considered is academic. See McNab, Incorporated, B-195105, January 19, 1980, 80-1 CPD 78.

EEC further contends that the RFP is "vague and ambiguous" since it fails to address anticipated problems in acquiring the desired quantities of unique parts used for the repair of old and obsolete engines. EEC states that although the contractor would need only a limited number of these parts to perform the contract, it would have to purchase entire production runs of them since production would entail the casting of new dies. As a result, EEC claims, it is foreseeable that the contractor would be left with large quantities of essentially useless parts, a hidden cost which EEC warns could cause the "financial ruin" of an unwary offeror. EEC would prefer that the contract obligate the Air Force to reimburse the contractor for parts which the contractor has had to purchase as part of a production run but which exceed the number needed to rebuild the engines.

While the Air Force concedes that this problem may be inherent in the contract, it points out that it took several measures to minimize the contractor's financial risk. Foremost in this regard was the change from an advertised to a negotiated format and the concurrent substitution of a time and materials contract for the original firm fixed-price contract, an adjustment intended, in part, to afford the Air Force greater flexibility in allowing reimbursement for materials. Further, several provisions were incorporated into the RFP to provide the contractor a mechanism for seeking modifications to work orders and for suggesting alternate approaches when problems arise. The Air Force points also to paragraph J-1, which provides for the condemnation of engines which the Air Force determines are beyond economical repair. The Air Force concludes that these provisions adequately addressed the parts problem and, thus, that the solicitation was not vague or ambiguous. It foresees no damage to the contractor.

Although the protester's argument is couched in terms of the RFP being deficient as "vague and ambiguous," we do not believe that is the essence of the protester's objection. EEC has not pointed to any provision of the solicitation which it is unable to understand, because of vagueness, or which is ambiguous, in that it is susceptible of more than one interpretation. To the contrary, the protester clearly perceives certain financial risks to

which the contractor may be exposed because the Air Force, in its solicitation, has not obligated itself to reimburse the contractor for certain costs. The gravamen of EEC's complaint, therefore, is that the contractor is exposed to an unreasonable financial risk.

It appears to us that in revising its solicitation the Air Force has been responsive to the concerns expressed by the protester. While there may remain an element of financial risk in the performance of certain aspects of the contract, we have recognized that some risk is inherent in most types of contracts, and offerors are expected to allow for that risk in formulating their proposals. Consolidated Maintenance Company, B-196184, March 18, 1980, 80-1 CPD 210; Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD 116. Thus, the presence of such risk here does not render the solicitation improper.

We add that there seems to be no factual basis for EEC's concern that an unwary contractor might be financially ruined as a result of hidden costs. It appears from the record that this topic received a great deal of discussion prior to cancellation of the original IFB, and we find no countervailing evidence that offerors actually failed to consider these costs in preparing their proposals. Neither is there any indication that contractors have incurred financial damage in performing prior contracts for this requirement. Since it is also clear that EEC itself was not misled, we cannot find that this issue should have been clarified by amending the RFP.

EEC next questions the Department of Labor's (DOL) determination that the Service Contract Act of 1965 (SCA) does not apply to this contract for engine overhaul and modification even though it applies to similar contracts for the overhaul of heavy equipment. It requests that our Office determine whether the SCA is made applicable here by Defense Acquisition Regulation (DAR) § 7-1903.41(a), which states that the SCA applies to certain service contracts in excess of $2,500.

Our Office has consistently held that DOL is the agency primarily responsible for the administration of the SCA and that contracting agencies must follow the views of DOL unless those views are clearly contrary to law. Digital Equipment Corporation, B-194363, April 23, 1979, 79-1 CPD 283; Midwest Service and Supply Co. and Midwest Engine Incorporated, B-191554, July 13, 1978, 78-2 CPD 34. Here, the agency found the SCA inapplicable to the contract pursuant to an October 10, 1978 directive from the Secretary of Labor exempting engine overhaul contracts from the SCA for a one year period, the result of a dispute over whether the SCA or the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1976), was properly applicable to these contracts. By letter dated October 19, 1979, that exemption was extended indefinitely pending finalization of newly-developed criteria for applicability of the SCA.

Section 4(b) of the SCA generally empowers the Secretary of Labor to allow reasonable exemptions from the Act's provisions where determined to be in the public interest and consistent with the remedial purpose of the statute to protect prevailing labor standards. 41 U.S.C. § 353(b) (1976). According to the October 10, 1978 directive, the Secretary made such a determination with regard to engine overhaul contracts and we have found no evidence of any countermanding order issued prior to the May 27, 1980 issuance of the RFP. Thus, although it appears that the SCA may otherwise have been applicable here, we find no basis to conclude that the exemption allowed by DOL was contrary to law. See Digital Equipment Corporation, supra.

In its comments upon the agency report, EEC contends for the first time that this procurement should have been solicited and administered by GSA as has been the practice in the past, and that the substitution of an Air Force contract will result in unnecessary duplicity in the procurement of these services. This contention is untimely raised. Our Bid Protest Procedures, supra, provide that protests of alleged improprieties in a solicitation which are apparent prior to the closing date for submission of proposals must be filed prior to that date. 4 C.F.R. § 20.2 (b)(1) (1980). It was clear from the face of the

solicitation that the Air Force, and not GSA, was administering this procurement and that the resulting contract would be with the Air Force. In order to be deemed timely, this ground of protest should therefore have been asserted prior to the July 11, 1980 closing date. Since it was not, this portion of the protest is untimely and not for consideration on the merits. See Potomac Documentation and Design, Inc., B-197347, B-197349, September 19, 1980, 80-2 CPD 211.

The protester asserts finally that the solicitation was discriminatory and restrictive since it allowed for proof of past experience only up to March 31, 1980 while also providing that the award might be made to other than the offeror proposing the lowest price. EEC apparently reasons that the potential impact of this alleged deficiency was enhanced by the possibility that the prior experience factor would carry at least as much weight as price in the source selection process. In this regard, the solicitation provided that cost would be a secondary factor in the award selection and provided that the four areas of primary importance in the evaluation were in order of importance: (1) experience, (2) facilities and equipment, (3) management capabilities, and (4) production. In the instructions for preparing proposals the solicitation provided that offerors were to submit written evidence of experience "within the past ten (10) years, ending 31 March 80, * * *."

The contracting officer explains the adoption of the March 31 cutoff date as follows:

> " (1) The date, March 31, 1980, * * * was included to establish a common period of time with no purpose to include or exclude particular experience of particular offerors. Current experience, defined as within the past ten years, is considered a significant indication of an offeror's capability to perform. A ten year period, if not further defined,

> could be interpreted by various offerors in a variety of ways, i.e. calendar year, their firm's fiscal year, * * * etc. The date that was selected to define the ten-year period, so that all responses would address a comparable time frame is the end of a calendar quarter immediately preceding RFP issue date. * * *"

The Air Force concludes that this evaluation criterion was sound and operated equitably with respect to all potential offerors.

Our Office has recognized that prior experience may properly be incorporated in an RFP as an evaluation factor where the needs of an agency warrant a comparative evaluation of that area. Interscience Systems, Inc.; Cencom Systems, Inc., B-195773, B-195773.2, May 8, 1980, 80-1 CPD 332. We have also stated that when experience is evaluated, the most recent information should be considered. New Hampshire-Vermont Health Service, 57 Comp. Gen. 347 (1978), 78-1 CPD 202. In the cited case, it appeared that the protester's most recent experience--occurring in the 7-month period immediately preceding proposal submission--could have significantly affected the award decision and that the selection official should have taken that experience into account. Here, however, it is clear that the Air Force is looking for extensive experience over several years, and we find it highly unlikely that the 14-week period about which the protester complains could have had a significant impact of the evaluation of an offeror's overall experience. In this respect, the protester has not explained either to the Air Force or our Office the nature of its experience which allegedly occurred within the 14-week period or how it might have significantly influenced the protester's potential evaluation score. We therefore find this aspect of the complaint also to be without merit.

The protest is denied.

Milton J. Socolar

Acting Comptroller General
of the United States