

1915661



DECISION

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

FILE: B-200316

DATE: August 18, 1981

MATTER OF: Central Washington University

DIGEST:

1. Contracting officer essentially was making a subjective judgment, and not applying a definitive criterion of responsibility, in determining whether bidder's proposed Principal Investigator for an archeological reconnaissance project had a sufficiently thorough knowledge of the local area so as to recognize major problems requiring investigation. This is the type of affirmative determination of responsibility which as a matter of policy GAO does not review.
2. Whether contractor's performance complies with contract specifications is a matter of contract administration which is not resolved by GAO under its bid protest procedures.

Central Washington University (CWU) protests the award of a contract to WAPORA, Inc., under invitation for bids No. DAKF57-80-B-0124, issued by the Department of the Army, Fort Lewis, Washington. We dismiss the protest because it raises issues which we do not review under our Bid Protest Procedures.

The purpose of this invitation for bids was to obtain certain archeological field reconnaissance services, described in the specifications, for a firm fixed price. Basically, the contractor was to survey certain Government-owned land for archeological or historic sites and prepare a report of its findings; make test excavations at certain sites and report thereon; and compile and summarize literature concerning the history and pre-history of Fort Lewis and Yakima Firing Center Lands. A single contract was to be awarded for these services on the basis stated in paragraph 10, Standard Form 33A:

[Protest of Army Contract Award]

01845 116137

"(a) The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered."

CWU's major argument is that the award to WAPORA was not "most advantageous to the Government, price and other factors considered." It also maintains that the contract is not being performed in accordance with the specifications.

In large part, this protest appears to result from a misunderstanding of procurement procedures shared by CWU and WAPORA: both seem to have regarded this procurement as a negotiated one even though it was formally advertised. As a consequence, both submitted documents with their bids which were not solicited and which were not appropriate to a formally advertised procurement. CWU, at least, also misunderstood how the bids were to be evaluated for award. Three factors appear to have contributed to the bidders' misunderstanding: (1) the fact that prior similar Army procurements were negotiated ones in which technical proposals were required; (2) incorrect oral advice which may have been given by an Army employee; and (3) an unclear "Contractor Qualifications" clause, discussed in more detail below. We point this out because CWU appears to have formed some mistaken impressions as to how the offers were to be evaluated and the contract awarded.

As for CWU's contention that the award made was not "most advantageous to the Government, price and other factors considered," we have consistently interpreted that language to require award on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder responsible. D.E.W. Incorporated, B-181835, December 5, 1974, 74-2 CPD 314. While the Government may consider factors other than the bid price (such as transportation costs) in determining the low evaluated bid and therefore the bid "most advantageous" to the Government, the invitation must provide for evaluation of those factors. See Refre and Associates--Reconsideration, B-196097.3, July 7, 1980, 80-2

CPD 13; Defense Acquisition Regulation § 2-407.5. No such "other factors" were set forth in the solicitation.

What this means is that the contract would be awarded to that responsible bidder offering the most favorable cost to the Government and whose bid was responsive to the invitation. In only one respect were bidders asked to submit any information beyond filling in the usual blanks in the bid documents and entering prices for the work and that was in the following clause which appeared in the specifications:

"CONTRACTOR QUALIFICATIONS. - The Principal Investigator must have a Ph.D. or equivalent experience and background in the field of Archeology. This person must demonstrate in the Field Reconnaissance Plan thorough familiarity with the archeology of the Columbia Basin and Puget Sound region such that he or she is well aware of major archeological problems in need of investigation. This person must supervise the conduct of the field reconnaissance with the assistance of a Field Director, who is either a professional archeologist, or a qualified archeologist under Washington State law. The Principal Investigator must also, through personal inspection, confirm the location and identity of all sites discovered during field work. He/she shall be present during all test excavations. The qualifications of the Principal Investigator and the Field Director shall be submitted with the Field Reconnaissance Plan and bid. The test evaluations of the sites shall be under the direct supervision of the Principal Investigator identified in the contract. The contractor may find that hiring a consultant from an Indian tribe who is knowledgeable about the area will permit more precise conclusions about the cultures which lived in the project areas. Prior to hiring such a consultant, the contractor must obtain approval of the Contracting Officer." (Emphasis added.)

It is not clear exactly what this clause required to be submitted with the bid. Apart from the words "and bid", the clause deals entirely with post-award obligations. The Field Reconnaissance Plan, for example, is listed as the first of "The Principal Items to be Accomplished" in the IFB's Statement of Work (SOW). Paragraph 1.2.1 of the SOW directs the contractor to:

"Submit for review and approval of the Contracting Officer a plan for a Field Reconnaissance that includes the research design, methods to be employed, the qualifications of the principal investigator and field director assigned to the project * * *."

There is nothing in the IFB which requires the Field Reconnaissance Plan to be submitted with the bid. However, the requirement for submitting the "qualifications" of the Principal Investigator and Field Director both in the post-award Field Reconnaissance Plan and with the bid appears to have influenced the bidders to submit extensive descriptions of how the work was to be accomplished--something not required by the IFB. WAPORA submitted a 61-page "technical proposal" which it stated was in response to the Army's "RFP", containing much information not required by the solicitation, such as descriptions of past contracts the firm had performed, resumes of staff other than the Principal Investigator and Field Director, a discussion of the company's support staff, laboratory facilities and graphics capabilities, and a detailed "Level of Effort" chart. In addition, a "cost estimate to conduct the proposed Level of Effort" was promised but apparently not sent.

The Army has provided us with only the cover page and Schedule from CWU's bid, but the protester advises that it also submitted an extensive technical proposal which it expected to be evaluated. It did so, it states, because during the preparation of its offer it consulted the Environmental Control Office at Fort Lewis (not the contracting office) and was told "to prepare a proposal similar to our successful proposal [for an earlier phase of the] work."

The bids received were as follows:

WAPORA	\$24,565
Fugro Northwest	55,458
CWU	56,936

The contracting officer states that he awarded the contract to WAPORA after reviewing the firm's credentials and the qualifications of its proposed Principal Investigator, which met the requirements of the "Contractor Qualifications" clause quoted above.

CWU first argues that the award to WAPORA was not "most advantageous to the Government, price and other factors considered" because WAPORA's staff lacks regional expertise. CWU concedes that the academic credentials of WAPORA's staff are acceptable but it points to three aspects of WAPORA's "technical proposal", in particular, as evidencing lack of regional expertise. First, the protester states that the resume of WAPORA's Principal Investigator does not reflect research experience in land use patterns of the Interior Plateau. Second, CWU argues, although the bibliography contained in WAPORA's proposal admittedly was not meant to be all-inclusive, there were such significant omissions of literature relevant to the pre-history of the Pacific Northwest as to suggest a lack of regional expertise. Third, the protester states that WAPORA's level-of-effort schedule casts doubt upon the firm's regional expertise and understanding of the problems in regional pre-history because it allocates insufficient time to accomplish certain tasks and does not budget any time for the Principal Investigator to visit any spring sites.

In contending that the Government has not made the award most advantageous to it "price and other factors considered," CWU interprets that phrase too broadly. As we stated above, in the context of a formally advertised procurement, "other factors" are objectively determinable elements of cost identified in the solicitation as to be evaluated in the selection of a contractor. There were none here. This was not a negotiated procurement in which the relative merit of technical proposals was evaluated and in which award could be made at other than the lowest cost to the Government in order to obtain superior technical expertise.

Since this was a formally advertised procurement, the purpose of requiring each bidder to submit with its bid a statement of the qualifications of the two individuals

primarily responsible for contract performance would be to aid the contracting officer in his determination of the low bidder's responsibility. We review contracting officers' affirmative determinations of bidders' responsibility only to a limited extent, as explained below.

In 1974, we observed that the determination of whether a bidder was a responsible prospective contractor essentially involved a matter of business judgment which is not readily susceptible to reasoned review. Because the burden upon the protester of showing that the contracting officer acted arbitrarily was so high, we concluded that no significant purpose would be served by our continued review of contracting officers' affirmative determinations of responsibility, absent actions by procuring officials which were tantamount to fraud. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Shortly thereafter, however, we also stated that where there was a question of whether a bidder met certain specific, objective or definitive guidelines or requirements, such as those involving prior experience, we would review the affirmative determination of responsibility to determine if it was founded on a reasonable basis. Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376.

The import of these cases is that we will not review the contracting officer's determination that WAPORA was responsible if the contracting officer essentially was making a subjective judgment. On the other hand, if the "Contractor Qualifications" clause imposed some specific, definitive criterion of responsibility, we would examine the record to see if WAPORA had submitted evidence which would support a finding that it met the criterion.

The "Contractor Qualifications" clause is confusing because it intermixes statements of the education and experience required of the Principal Investigator and Field Director with descriptions of some of their duties. For example, the clause states that the Principal Investigator

"shall be present during all test excavations." That is a contractual performance requirement which does not appear relevant to the contractor's "qualifications". The wording of the clause is such that it is difficult to pinpoint exactly what bidders had to demonstrate concerning their qualifications. Nevertheless, it is reasonably clear that bidders had to show that the Principal Investigator possessed some regional expertise, or in the terms of the clause: "thorough familiarity with the archeology of the Columbia Basin and Puget Sound region such that he or she is well aware of major archeological problems in need of investigation."

The Army contends that the determination of whether an individual has a sufficiently thorough knowledge of an area to recognize major problems within it is a matter of subjective judgment, not of applying objective or definitive criteria. Therefore, the Army maintains, the contracting officer's affirmative determination of WAPORA's responsibility is the type of judgmental exercise which we said in our 1974 decisions we would no longer review.

We agree with the Army's position. While the solicitation required submission of data showing the Principal Investigator's qualifications, the relative quality of those qualifications is a matter for evaluation by the contracting officer who, as part of his consideration of whether WAPORA was a responsible prospective contractor, had to form a judgment as to whether the firm's Principal Investigator knew enough about the local area to recognize the major archeological problems which might arise. We think that is the type of judgmental decision which as a matter of policy we stopped reviewing in 1974. Therefore, we will not review the contracting officer's affirmative determination of WAPORA's responsibility.

The protester also contends that WAPORA's contract is not being "performed and administered" in accordance with the contract specifications. CWU has pointed to several post-award circumstances which, it states, demonstrates that the Army did not require WAPORA to adhere to the specifications.

The question of whether WAPORA is performing in accordance with the terms of award under the solicitation is a matter of contract administration which does not relate to the propriety of the award. Contract administration is the function and responsibility of the procuring activity and we do not resolve such matters under our Bid Protest Procedures. Schmidt Engineering & Equipment Co., Ltd., B-198542, February 19, 1981, 81-1 CPD 108.

The protest is dismissed.)



for Harry R. Van Cleve
Acting General Counsel