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DECISION



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

FILE:

B-205819

DATE: June 16, 1982

MATTER OF:

Jamar Trucking

DIGEST:

1. Protest that solicitation reflects method of operation, which agency will not follow is denied where record fails to show that agency intended to deviate from solicitation provision or that agency otherwise acted improperly or in a way prejudicial to protester in conducting the procurement.
2. GAO will not consider protest contention that agency's method of operation will result in unnecessary expenditures since how agency should perform its functions is not reviewable under Bid Protest Procedures, which are reserved for considering the legality and propriety of agency actions related to award of contracts.
3. Affirmative determination of responsibility will not be questioned by GAO except in circumstances not present here.
4. Protest alleging improprieties apparent in a solicitation not filed with either the contracting officer or GAO prior to the deadline for the submission of offers is untimely.

Jamar Trucking protests the award of contracts by the Military Traffic Management Command (MTMC), U.S. Army for freight transportation from the Defense Depot, Memphis, Tennessee to a number of specified destinations. Jamar's primary basis of protest is that the solicitation reflects a method of operation which the agency will not follow and that will result in unnecessary expenditures if the agency does follow it. Jamar also maintains that the solicitation should have been set aside for small business and that a

specification provision concerning weight load provides one particular carrier with a competitive advantage. Finally, Jamar contends that several of the firms listed as primary carriers for designated routes under this solicitation are not capable of performance. We find the protest to be without merit or otherwise untimely.

The procurement was initiated on November 6, 1981 by the issuance of solicitation letters to several carriers. The letters requested the submission of tenders setting forth rates for shipments to the various destinations specified. In accordance with the solicitation letters, the agency was to evaluate the tender offers received and then select firms as the primary and alternate carriers for each destination.

Jamar interpreted the solicitation letters as indicating a change in the existing method of moving freight, and prior to the December 8 due date for receipt of tenders it telephoned the Depot to get clarification on this point. The Depot's Traffic Manager told Jamar that no changes were intended. Jamar protested to our Office on December 15. Awards were made on February 3, 1982.

On the primary protest issue, the Army reports that the Depot will operate as it had been, and that Jamar's problem arose "from the fact that the new solicitation * * * more accurately reflects the Depot's operations than the [prior] solicitation * * * [and that while] it may appear that the Depot's operations are being changed, in effect, they are not." Jamar does not agree with that statement, and contends that the Depot is not adhering to the solicitation letters.

It is not clear from the record that the Depot is in fact operating and allowing carriers to operate in a manner inconsistent with the November solicitation letters. The record also does not establish that the Depot intended to operate contrary to the terms of the solicitation letters. Moreover, Jamar has not alleged how it might have been prejudiced as an offeror by the situation it perceives. Additionally, in this regard, we point out that Jamar's tender offer was not considered

because it was received late. Under the circumstances, we are unable to conclude that the agency acted improperly or in a way prejudicial to Jamar in conducting this procurement.

With regard to Jamar's allegation that the Depot's stated approach will be more costly, the agency reports that with the changes in how rates were requested (as opposed to actual shipping operations) it expects to realize significant savings. In any event, an agency's method of operation is not subject to legal challenge on the grounds that the agency could operate more efficiently. Under our Bid Protest Procedures, we resolve questions concerning the legality (measured by applicable law and regulation) and propriety (measured by the dictates of sound procurement policy) of agency actions related to the award of procurement contracts, not questions regarding how agencies should operate in performing their functions.

Similarly, we generally do not consider challenges to an agency's determination that an offeror is capable of performing a contract. Such an affirmative determination is largely a discretionary business judgment, and unless there is a showing of possible fraud or bad faith on the part of contracting officials or of noncompliance by the offeror with certain solicitation criteria we will not rule on a complaint based on a contention that an offeror cannot perform. See, e.g., Lite Industries, Inc., B-200646, January 30, 1981, 81-1 CPD 55. Consequently, we will not consider Jamar's assertion that some firms selected as primary carriers are not capable of performing.

Jamar's remaining contentions, that this procurement should have been set aside for small business and that a solicitation provision gave one firm a competitive advantage, are untimely. Our protest procedures require that perceived deficiencies in a solicitation must be protested to either the contracting officer or our Office prior to bid opening or the closing time for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1981). Both issues involve alleged solicitation defects, but neither was raised until the protest was filed here after the deadline for submission of tenders. While Jamar states that

it was not aware of our procedures and the timeliness requirements, our Bid Protest Procedures have been published in the Federal Register and protesters are charged with constructive notice of their contents, Coventry Manufacturing Company, Inc., B-201626, January 22, 1981, 81-1 CPD 41. Therefore, we will not consider these issues.

Jamar, throughout its correspondence, refers to various other matters in connection with the Depot's operations, including how it was treated under a prior contract and how other carriers are now being dealt with. These too are not matters appropriate for consideration under our protest procedures.

The protest is denied in part and dismissed in part.

for Harry D. Chen, Chief
Comptroller General
of the United States