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

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FILE: B-211246.2 **DATE:** October 11, 1983

MATTER OF: OAO Corporation

DIGEST:

1. GAO will consider a protest against a D. C. Lottery and Charitable Games Control Board procurement, even though appropriated funds may not be involved since, as a general matter, the D. C. Government acquiesces in GAO's review of its procurement actions, and has done so here, in order to provide an independent non-judicial review forum.

2. A protest against an allegedly defective solicitation is timely where filed 37 minutes before the closing time set for receipt of proposals. There is no requirement that such protests be filed sufficiently prior to the closing time to allow for a meaningful response before that time passes.

3. GAO will not consider bases of protest pending before a court of competent jurisdiction where the court has not expressed interest in receiving a GAO opinion. The fact that the protester is not a party to the litigation is irrelevant.

4. Evaluation factors contained in a solicitation are not defective where they are described as including but not limited to certain specified considerations. An agency is not required to identify explicitly every aspect of an evaluation factor which it might take into account, provided that such aspects are reasonably related to the stated factor.

5. An agency's failure to issue a formal solicitation amendment to impose a demonstration requirement was not prejudicial where the protester received actual written notice of the requirement.

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6. An agency's statement in its report of the selection decision that it believes only four firms could have responded to its requirements does not demonstrate that it made an improper "prequalification" of offerors (excluding the protester) where there is no evidence that the agency attempted to determine the eligibility of firms to compete prior to issuing its solicitation, or that it would only consider an offer if submitted by one of the four firms mentioned.

OAO Corporation protests the District of Columbia Lottery and Charitable Games Control Board's (the Board) award of a contract to Lottery Technology Enterprises (LTE). The procurement was for an on-line lottery system. We dismiss the protest in part and deny it in part.

The Board first issued a solicitation for this requirement in December of 1982. As the result of a law suit instituted by D. C. Data Company, that solicitation was canceled. A new solicitation, which is the subject of this protest, was issued on May 7, 1983. OAO did not submit an offer in response to either solicitation.

The protester contends that the request for proposals (RFP) did not provide adequate time to prepare offers and that both the specifications and evaluation factors were ambiguous and unclear. OAO asserts that these RFP deficiencies made it impossible for OAO to submit a proposal.

Preliminary Matters

LTE argues that we should dismiss the protest for lack of jurisdiction because there are no appropriated funds involved in the procurement. The District of Columbia Appropriation Act of 1983, Pub. L. No. 97-378, 96 Stat. 1925, 1931 (1982), provides that no revenues from Federal sources shall be used to support the operations or activities of the Board.

As OAO notes, the General Accounting Office traditionally has considered protests involving District of Columbia

(D.C.) procurements. See State Equipment Division of Seacorp National Inc., 55 Comp. Gen. 1467 (1976), 76-2 CPD 270. We have done so with the acquiescence of the D. C. Government (as is the case here), in order to provide an independent non-judicial forum for the review of its procurement actions. The degree to which appropriated funds are present in any given D. C. procurement is not a prerequisite to our consideration of such protests. We therefore find no merit to LTE's argument.

LTE also contends that OAO lacks standing to protest that it was improperly excluded from the competition, since LTE believes the principals of OAO in fact joined with another offeror in submitting a response to the RFP. OAO responds that LTE's information is incorrect. In any event, we consider OAO an "interested party" qualified to protest under section 21.1(a) of our Bid Protest Procedures, 4 C.F.R. part 21 (1983). Whether a party is sufficiently interested under our Procedures depends on its status in relation to the procurement, the nature of the issues raised, and whether these circumstances indicate the existence of direct or substantial economic interest on the part of the protester. Engine and Equipment Company, Inc., B-199480, May 7, 1981, 81-1 CPD 359. Where, as here, a protester alleges that solicitation deficiencies made it impossible for it to properly prepare and submit an offer, we consider its interest sufficiently affected to warrant our consideration of its protest. See Fred Anderson, B-196025, February 11, 1980, 80-1 CPD 120.

LTE further argues that we should consider OAO's protest untimely because it was not filed until 37 minutes prior to the closing time set for receipt of proposals. Although LTE recognizes that section 21.2(b)(1) of our Procedures only requires that protests such as this be filed before the closing time for receipt of proposals, it alleges that the timing here precluded a meaningful response to OAO's concerns before the filing deadline passed. In addition, LTE asserts that OAO's grounds of protest were not specific enough to be given meaningful consideration.

We find no merit to LTE's position. As LTE itself recognizes, OAO's protest was technically timely under our Procedures. There simply is no requirement that a protest

be filed sufficiently prior to the closing time to allow for "a meaningful response" before that time passes.

Further, OAO's protest clearly stated that its reasons for protesting were that the period provided for proposal preparation was too short, and that the evaluation criteria and specifications were defective. While the alleged evaluation factor and specification deficiencies were not detailed, the initial protest submission was sufficient, under our Procedures, to initiate the protest process. The specific deficiences were later identified in a supplemental OAO submission, and we routinely consider such later-filed materials when they provide the rationale for a protest basis clearly stated in an initial protest. See Memorex Corporation, 61 Comp. Gen. 42 (1981), 81-2 CPD 334.

LTE points out that the issue of whether the RFP provided adequate time for the preparation of proposals is pending before the Superior Court of the District of Columbia in a suit for preliminary and permanent injunctive relief brought by another vendor. (Control Data Corp. v. D. C. Lottery and Charitable Games Control Board, Civil Action No. 6064-83.) The court has not expressed interest in a GAO decision and, as LTE notes, it is our policy not to decide a protest where the material issues are before a court of competent jurisdiction unless the court requests, expects or otherwise expresses an interest in our decision. 4 C.F.R. § 21.10. This policy applies whether or not the protesting party is involved in the pending litigation. Roarda, Inc.--Request for Reconsideration, B-204524.4, February 1, 1982, 82-1 CPD 73.

OAO argues that we should not relinquish our jurisdiction because OAO is in a different position than the plaintiff, Control Data Corporation (CDC). This argument appears to be based on the fact that CDC, as part of a joint venture, submitted an offer in response to the first solicitation. OAO believes that the length of time allowed for submission of proposals is more crucial to a vendor, like itself, which did not respond to the first solicitation.

While OAO's belief may well be correct, the fact remains that the very issue the protester raises here is now pending before a court of competent jurisdiction. Consequently, for our procedural purposes we consider it irrelevant that OAO and CDC may not be similarly situated, and

we dismiss OAO's protest insofar as it pertains to matters before the court. See Roarda, Inc.-Request for Reconsideration, supra. We will, however, consider those issues that are not before the court. See A & J Produce,Inc; D & D Poultry, B-203201.2; B-203201.3, January 25, 1982, 82-1 CPD 52.

Merits

OAO contends that the RFP evaluation factors were defective because each of the major factors, while set out in detail, was described as "including but not limited to" certain enumerated subcriteria and considerations. OAO asserts that as a result, the evaluation factors were too vague.

Although agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify the various aspects of each which might be taken into account, provided that such aspects are reasonably related to or encompassed by the stated criterion. Bell & Howell Corporation, B-196165, July 20, 1981, 81-2 CPD 49. Thus, the Board was not required to list every single aspect of a proposal that it would evaluate under each criterion. (Of course, the Board could not rely on the "including but not limited to" language to consider matters not reasonably related to the specified criteria.) We therefore find nothing improper in the RFP's statement of the evaluation criteria, and we deny this aspect of OAO's protest.

In a similar vein, OAO objects to the Board's approach to defining certain terms used in the RFP by stating, in the solicitation's "Glossary," that the terms include, but are not limited to, specified components or capabilities. For example, the RFP defines "central system" as,

> "the contractor's computer center, equipment, and personnel required to operate the on-line lottery game. This includes but is not limited to, the data processing rooms and all standard equipment, computers and peripherals . . ., air conditioners, security systems . . ., supplies and administrative and operating personnel."

The other terms in issue are "central facility/facilities," "complete central system," and "new equipment."

We do not consider this approach to defining terms used in the RFP objectionable. We view it, rather, as recognition that while it would be helpful to define each term with which the contracting parties will deal during the administration of the procurement, it simply is impossible to delineate every conceivable element of each term. We do not think that recognition reflects anything unusual, or that expression of it at the outset of the RFP was misleading or unreasonable. Consequently, we find no merit to OAO's objection.

OAO also argues that the Board acted improperly by not issuing a written solicitation amendment when it imposed a requirement that offerors conduct demonstration tests of their computer systems. This requirement appeared in a cover letter accompanying unrelated RFP amendments.

We find no merit to OAO's argument. It is clear that OAO received actual written notice of the requirement and therefore was not prejudiced by the Board's not issuing a formal RFP amendment. See NBI, Inc., B-206285.2, September 28, 1982, 82-2 CPD 290.

In addition, OAO argues that the demonstration requirement unduly restricted competition because it was imposed only 7 days before proposals were due. OAO contends that no offeror who had not submitted a proposal previously could respond to the new requirement in that time frame. We will not consider this allegation because we believe it is encompassed by the more general issue of whether the RFP allowed for adequate proposal preparation time, now pending before the Superior Court.

OAO also claims that the Board improperly predetermined that there were only four offerors qualified to respond to the RFP. It bases its position on a statement the Board made in its report to the District of Columbia Contract Review Committee, advising of the selection of LTE, that "In the on-line lottery industry there are four main companies . . . ." The Board later also stated that it believes there are only four companies that can bid on this type of contract. OAO asserts that the Board's position amounted to an improper prequalification of offerors. OAO cites two of our decisions, Rotair Industries; D. Moody &

Co., Inc., 58 Comp. Gen. 149 (1978), 78-2 CPD 410, and D. Moody & Co., Inc.; Astronautics Corporation of America, 55 Comp. Gen. 1 (1975), 75-2 CPD 1, for the proposition that prequalification of offerors is an unwarranted restriction on competition.

We disagree with OAO. The cases cited involve situations where an agency determined prior to soliciting bids whether or not a firm was eligible to compete, and refused to consider bids from sources that had not been so prequalified. That is not the case here. There is nothing to indicate that the Board attempted to determine the eligibility of firms to compete prior to issuing the RFP, or that it would have refused to consider an offer from a firm other than the four mentioned in its report. Rather, we believe it is clear that the Board's statements indicate nothing more than its belief that, as a practical matter, only four firms are capable of bidding on a contract of this nature. We cannot conclude that the Board's statements reflect any impropriety in terms of improperly "prequalifying" offerors. We therefore deny this aspect of OAO's protest.

The protest is dismissed in part and denied in part.

for Milton J. Socolar
Comptroller General
of the United States