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DECISION



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

FILE: B-217361 **DATE:** January 8, 1985
MATTER OF: Wall Colmonoy Corp.

DIGEST:

1. Protest against award to any other offeror is dismissed as premature where the agency still is evaluating proposals it received in response to the solicitation and no award decision has been reached.
2. The government can accept a below-cost offer from a responsible concern, although the contracting officer is expected to insure that the contractor does not recover any resultant losses through change orders or otherwise.
3. GAO will not review an affirmative determination of responsibility absent a showing of fraud or bad faith on the part of procurement officials, or an allegation that a specific responsibility criterion in the solicitation was not met.
4. Protest that a competitor may be using the protester's proprietary data presents a dispute between private parties, which is not for consideration under GAO's Bid Protest Procedures.
5. GAO will not consider whether a former government employee has violated the Ethics in Government Act, since that is a criminal statute for interpretation and enforcement by the Department of Justice.

Wall Colmonoy Corp. (Wall) protests the possible award of a contract to Vac-Hyd Corp. under Air Force solicitation No. F34601-84-R-45557 for the overhaul, repair and modification of engine turbine nozzles at Tinker Air Force Base. Wall contends that Vac-Hyd, who the protester says is the

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only other firm in contention for the award, has submitted a below-cost offer and therefore should be found nonresponsible. Wall also complains that Vac-Hyd used to employ a former government employee who had participated in a prior Air Force nozzle-repair contract with Wall while working at Tinker Air Force Base. Wall contends that this individual had access to Wall's proprietary data and may have provided it to Vac-Hyd or other of Wall's competitors. Wall further suggests that the individual's conduct violates the Ethics in Government Act of 1978, 18 U.S.C. § 207 (1982).

We dismiss the protest.

Wall states in the protest that the Air Force has not yet selected an awardee. Consequently, the complaint that the Air Force will improperly award a contract to Vac-Hyd is speculative and premature. Mil-Craft Mfg., Inc., B-214015, May 7, 1984, 84-1 C.P.D. ¶ 512; Security Assistance Forces & Equipment Export Corp., B-207787, June 22, 1982, 82-1 C.P.D. ¶ 617.

In any event, we would not consider the merits of the issues raised. There is nothing improper in the submission or acceptance of a below-cost offer, assuming the offeror is found responsible, although contracting officers are expected to take appropriate action to ensure that the contractor does not recover any resultant losses through change orders or otherwise. See Western Waste Management, B-216392, Sept. 24, 1984, 84-2 C.P.D. ¶ 344.

Moreover, before any contract can be awarded, an agency must find the offeror responsible. Because such a finding involves subjective determinations based on business judgment, our Office will not review a challenge to an affirmative determination in that respect absent a showing of possible fraud or bad faith on the part of contracting officials, or an allegation that a specific responsibility criterion set forth in the solicitation was not met. 4 C.F.R. § 21.3(g)(4) (1984). Wall does not suggest that either exception would apply here.

As to the remaining issues, Wall's concern that Vac-Hyd is using Wall's proprietary data presents a dispute between private parties that we do not consider under our

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Bid Protest Procedures. SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 C.P.D. ¶ 121. Further, 18 U.S.C. § 207, which forbids a person from representing others before the government in connection with matters in which the individual participated as a government employee, is a criminal statute whose interpretation and enforcement are primarily matters for the Department of Justice, not this Office. See Sterling Medical Associates, B-213650, Jan. 9, 1984, 84-1 C.P.D. ¶ 60. Our interest, within the confines of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or bias on behalf of, the contract awardee. National Service Corp., B-205629, July 26, 1982, 82-2 C.P.D. ¶ 76. We have no reason to believe there has been, or will be, any improper influence here.

The protest is dismissed.

Harry R. Van Cleve
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General Counsel