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DECISION



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

FILE: B-216958 **DATE:** April 24, 1985
MATTER OF: Systems Associates, Inc.

DIGEST:

1. Protest that agency's specifications for equipment are unduly restrictive is untimely under GAO's Bid Protest Procedures where the protester filed a timely protest with the contracting agency before responses to the specifications were due, but waited almost 4 months to file with GAO after the agency received responses from vendors without taking the action requested in the protest to the agency.
2. In reviewing an agency's evaluation of written responses to a Commerce Business Daily notice of intent to place an order against a particular vendor's nonmandatory automated data processing equipment schedule contract, GAO's role is to ascertain whether there was a reasonable basis for the evaluation and whether the evaluation was consistent with seeking a competitive solicitation, if possible, of the agency's requirements. ✓

Systems Associates, Inc., protests the Department of Health and Human Services' (HHS) purchase under NBI, Inc.'s nonmandatory automated data processing (ADP) schedule contract of equipment, plus installation, for a shared resource, integrated word processing system for the Social Security Administration's claims modernization project. Systems Associates complains that HHS's purchase requirements were unduly restrictive because they specified NBI's equipment. Systems Associates contends that it has equipment which meets the agency minimum needs at a price lower than NBI's.

We dismiss the protest in part and deny it in part.

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HHS had published in the Commerce Business Daily (CBD) notice of the agency's intent to place an order against an ADP schedule contract. The notice identified the requirement as an NBI system 64, or equivalent, and listed the various items of equipment for the system. Interested schedule and nonschedule vendors were invited to request a copy of the request for information (RFI) listing the detailed functional requirements and desirable features and were advised that any responses would be used for assessing capable sources.

Sixteen companies, including Systems Associates, asked for copies of the RFI. Immediately after receiving the RFI, Systems Associates filed a protest with HHS alleging that certain technical specifications were overly restrictive and that the requirement for NBI or equivalent equipment constituted an unjustified sole-source procurement. At the RFI's listed closing date, a total of five companies, including Systems Associates and NBI, responded with technical information and equipment prices. Systems Associates, shortly after submitting its information and prices, again protested the RFI's equipment specifications to the agency.

After evaluating the responses of the five companies, HHS determined that only NBI's equipment met its needs. With regard to Systems Associates, HHS found that the company did not provide for (1) a required equipment cabling length of 5,000 feet; (2) "a floppy diskette drive with at least 1 [megabyte] of storage on the [central processing unit]," for individual document archiving and storage purposes; (3) a stand-alone workstation with a 1-megabyte disk drive; and (4) a stand-alone/shared resource workstation with 1-megabyte disk drives. A delivery order for the equipment was issued to NBI at a price of \$142,938.

Following notification of the award, Systems Associates protested to HHS that its equipment met the government's needs. Systems Associates filed a protest with our Office after HHS denied the protest at that level.

Systems Associates contends that the RFI's specifications were unduly restrictive of competition, in that they essentially describe NBI's equipment. The protester asserts that it has copies of two other solicitations under which NBI competed that describe the requirements the same as does the RFI--according to Systems Associates, NBI gave the contracting activities sample specifications as guides for

writing equipment requirements and "the wording between these three specifications leave little doubt that they were originated from the same source document."

Systems Associates also objects to HHS's finding that the company's equipment did not meet the government's minimum needs. Specifically, Systems Associates alleges that the system it described to HHS showed a cable length that could support a computer terminal at a distance of 6,000 feet, exceeding HHS's requirement of 5,000 feet. With regard to the need to provide 1-megabyte of floppy diskette storage with the central processing unit, Systems Associates argues that neither it nor NBI actually is capable of providing 1-megabyte diskette storage, since the operating software stored on a 1-megabyte diskette uses part of the storage capability, but both companies are capable of storing documents with 350 or more pages; Systems Associates suggests that HHS's real need is for the capability to store "archive documents" up to 350 pages in length. In addition, Systems Associates states that the system it described to HHS has a 17-megabyte cassette drive on the central processing unit, and that the 17-megabyte cassette is "more practical" than a floppy diskette drive in dealing with a large storage requirement.

HHS argues that Systems Associates' protest with regard to the restrictiveness of the agency's equipment requirements is untimely. Since Systems Associates initially objected to HHS with respect to the specifications, the agency takes the position that any subsequent protest had to be filed with our Office within 10 working days of initial adverse agency action. According to HHS, initial adverse action occurred when time specified in the RFI for receipt of responses passed without amendment of the RFI. HHS asserts that Systems Associates therefore should have filed a protest with us within 10 working days after the RFI closed.

As to the equipment offered by Systems Associates, HHS states that it was essential that an offeror's equipment conform in all material aspects to the RFI's requirements. Since Systems Associates' equipment was found to be non-compliant in four material areas, HHS argues that the company's equipment was properly determined to be unacceptable.

We dismiss as untimely the protest that the specifications were unduly restrictive, for the reason proffered by

HHS. Our Bid Protest Procedures require that where a timely protest is filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of the contracting agency's initial adverse action on the protest. 4 C.F.R. § 21.2(a) (1984). Here, System Associates properly protested against the specifications to HHS before responses to the RFI were due. 4 C.F.R. § 21.2(b)(1). The time for filing with our Office, however, started when HHS received the responses without taking the action requested by Systems Associates; we consistently have held that type of inaction by an agency to be initial adverse action within the meaning of our Procedures. See Castle/Division of Sybron Corp., B-216551, Oct. 15, 1984, 84-2 C.P.D. ¶ 407. Since Systems Associates did not protest to our Office within the required time--the firm waited almost 4 months to file--we dismiss the protest on this issue as untimely.

Systems Associates' complaint that HHS improperly rejected the firm's response and accepted NBI's is timely, since the firm protested that matter to HHS within 10 working days after it learned of these actions, see 4 C.F.R. § 21.2(b)(2), and appealed to our Office within 10 working days after HHS's adverse response. Nevertheless, we find no legal merit to System Associates' position.

Initially, we point out that nonmandatory ADP schedule contracts are not awarded on a competitive basis. The reason for testing the ADP market through a CBD notice and evaluation of responses in a situation like this one is to determine whether there are vendors without schedule contracts who are interested in competing for the requirement at prices that would make competition practicable. See CMI Corp., B-210154, Sept. 23, 1983, 83-2 C.P.D. ¶ 364. In reviewing an agency's evaluation of responses to its announced intention to place an order against a nonmandatory ADP schedule, our concern is whether there was a reasonable basis for the evaluation and whether the evaluation was consistent with seeking the maximum practicable competition. Id.

In our view, there was a reasonable basis for HHS's evaluation of the protester's response to the RFI. The RFI set forth in detail the mandatory functional requirements for the word processing system intended to be purchased. The RFI also cautioned that the written response of any source had to show that its equipment met all the mandatory

functional requirements. Systems Associates competed against the specification for a 1-megabyte storage capability, yet admits that it is not capable of meeting that requirement. Further, Systems Associates has offered nothing to refute HHS's finding that its written response made no provision for either stand-alone workstations, or a stand-alone/shared resource workstation with 1-megabyte disk drives.

The protester has the burden of proving its case, that is, that its ADP system is qualitatively equivalent to the schedule vendor's equipment. NCR Corp., B-215048, Dec. 26, 1984, 84-2 C.P.D. ¶ 698. Here, System Associates simply has not shown that HHS's evaluation of the firm's response to the RFI was unreasonable. The protest on this issue therefore is denied.

The protest is dismissed in part and denied in part.

for Seymour E. Fox
for Harry R. Van Cleve
General Counsel