

Justi
PL-I

31202

DECISION



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

FILE: B-218251

DATE: May 15, 1985

MATTER OF: T.R.A.P. Equipment Corp.

DIGEST:

1. Protest based on alleged improprieties in a solicitation that were incorporated by amendment must be filed before the date proposals in response to the amendment are due.
2. When, based on agency's urgent need for aerial work platforms, and its dissatisfaction with the previous performance of used platforms, the RFP expressly requires delivery of new items 90 days after award, offer to deliver new platforms in 120 days with interim use of used ones properly was rejected as unacceptable.
3. GAO does not review a contracting officer's affirmative determination of responsibility absent a showing it was made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met.
4. Whether a contractor will deliver a product conforming to the awarded contract is a matter of contract administration for resolution by the contracting agency, not GAO.

T.R.A.P. Equipment Corp. (TRAP) protests the Navy's award of a contract for the lease and maintenance of 22 new 80-foot telescoping aerial work platforms to Trico Lift Inc. (Trico) pursuant to request for proposals (RFP) No. N00140-85-C-EZ40. The platforms are needed for use in sandblasting, burning, welding, and painting on ships scheduled for overhaul at the Philadelphia Naval Shipyard. TRAP argues that (1) the delivery schedule in the solicitation is unattainable, (2) its offer to supply used equipment until it could deliver the new platforms should have been found acceptable, and (3) Trico and its manufacturer for this solicitation are not responsible.

We dismiss the protest on the first and third issues, and deny it on the second.

032051

The RFP delivery schedule required that six units were to be received within 60 days after the date of the contract; eight more units were to be received within 75 days after award, and the final eight units were to be received within 90 days. The RFP cautioned that if the offeror failed to comply with the delivery schedule, the offer would be considered nonresponsive and rejected.

TRAP proposed a delivery schedule in which the last eight units would be received within 120 days after the date of the contract, i.e., 30 days later than the date required by the solicitation. The contracting officer found TRAP's offer unacceptable and awarded the contract to Trico, the next low offeror.

Delivery Schedule

TRAP protests that the delivery schedule in the solicitation was not attainable due to the special engineering and testing required to comply with the specifications.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), require that a protest based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals be filed before that date. Likewise, alleged improprieties not contained in the initial solicitation, but which are later incorporated into the solicitation, must be protested by the next closing date for receipt of proposals following the incorporation.

The delivery schedule in issue was incorporated in the solicitation by a December 20, 1984 amendment issued after initial proposals were received, and which requested revised proposals by December 27. Because TRAP's protest concerning the delivery schedule was not filed with our Office until February 28, 1985, it is untimely and, therefore, will not be considered on the merits.

Technical Acceptability

TRAP complains that in rejecting its proposal based on the delivery requirement for the last eight units, the Navy improperly discounted the firm's offer to provide used equipment until the new units were delivered. We find no merit to the argument.

TRAP's proposal clearly was not responsive to the delivery schedule set forth in the solicitation. TRAP offered the last eight units 30 days after that schedule, in spite of the warning in the solicitation that if the proposal failed to comply with the delivery terms it would be considered unacceptable. We note that the record includes a statement of urgency that accompanied the Philadelphia Naval Shipyard's requisition for the units, indicating that a delay in delivery would adversely affect the facility's ability to meet critical schedules, and that any delay in undocking the ships in dry dock could cost the Navy hundreds of thousands of dollars.

We cannot agree that the Navy had to accept TRAP's offer of allegedly suitable used equipment free of charge for the 30-day period. The solicitation expressly called for new equipment; according to the Navy, new units were specified "because previous experience had shown that used platforms were subject to frequent breakdowns, causing costly disruptions to ship overhaul schedules." TRAP participated without objection in the solicitation, and thereby must be deemed to have accepted the terms of the procurement. See Jordan Panel Systems Corp., B-209469, Dec. 8, 1982, 82-2 C.P.D. ¶ 523.

In light of the above, we find that the Navy properly rejected TRAP's offer.

Responsibility

Because TRAP properly was found technically unacceptable, and there were three offerors other than Trico who would be in line for award if Trico's offer were rejected, TRAP has no direct economic interest that was affected by the award of the contract and, thus, is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a), to complain about the award. Still, to the extent that TRAP complains about a poor performance record for Trico's manufacturer, as well as the alleged inability to perform with respect to the present contract, TRAP is protesting the agency's finding that Trico is a responsible concern. Our Office does not review a contracting officer's affirmative determination of responsibility absent a showing that it was made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(f)(5). These exceptions are not present here. Moreover, whether Trico delivers equipment that meets its

contractual obligation is a matter of contract administration to be resolved by the Navy and not our Office.
4 C.F.R. § 21.3(f)(1).

The protest is dismissed in part and denied in part.


for Harry R. Van Cleve
General Counsel