

**DECISION**



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

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**FILE:**

B-218268

**DATE:** June 3, 1985

**MATTER OF:**

Santa Fe Engineers, Inc.

**DIGEST:**

1. Protest challenging agency's plan to prequalify bidders which was not filed until after date for submission by potential bidders of prequalification questionnaire is dismissed as untimely, since agency's plan was apparent from Commerce Business Daily notice announcing prequalification restriction, and specific prequalification criteria were set out in questionnaire. To be timely, protest should have been filed before date for submission of prequalification questionnaire.
2. Protester's contention that prequalification criteria unduly restrict competition, because a bidder could satisfy the responsibility standards in the solicitation, but fail to meet the prequalification criteria, is without merit, since prequalification criteria and responsibility standards are cumulative requirements, all of which must be met before a bidder may receive the contract award.

Santa Fe Engineers, Inc. protests the use of a prequalification procedure by the Department of the Navy in connection with invitation for bids (IFB) No. N62474-84-B-4352 for construction of a composite medical facility at Travis Air Force Base, California. We dismiss the protest in part and deny it in part.

On December 5, 1984, the Navy published a notice in the Commerce Business Daily announcing plans to construct a composite medical facility at Travis Air Force Base, consisting of a hospital, aeromedical staging facility, dental clinic, and energy plant. The announcement

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informed potential bidders that the IFB would be issued only to contractors who had been prequalified by the Navy. Prequalification was to be determined on the basis of a questionnaire regarding each potential bidder's prior experience with projects of a similar magnitude. Completed questionnaires were required to be submitted to the Navy by January 11, 1985. The protester states that it asked for and received the prequalification questionnaire but, because it decided that it would not meet the prequalification criteria, Santa Fe did not submit a completed questionnaire to the Navy.

On February 11, 1 month after the date for submission of the questionnaire, Santa Fe filed a protest with the Navy contending that use of the prequalification procedure was improper as an undue restriction on competition. By letter dated February 26, the Navy denied the protest. Santa Fe then filed its protest with our Office on March 1. After completion of the prequalification procedure, the Navy issued the IFB on March 26.

Santa Fe argues that use of any prequalification procedure in this procurement is improper as an undue restriction on competition. As evidence of the procedure's restrictiveness, Santa Fe points to several prequalification criteria which it states exclude it from the competition and further maintains that the standards for prequalification are not sufficiently definite. Santa Fe also raises a subsidiary issue, whether prequalification may ever be used in a procurement conducted using formal advertising procedures.

The basis of Santa Fe's protest--a challenge to the use of a prequalification procedure--was apparent after issuance of the December 5 announcement of the Navy's plan to require prequalification. Further, to the extent that Santa Fe seeks to challenge the propriety of specific prequalification criteria, as well as the use of prequalification per se, that ground of protest was evident from the prequalification questionnaire, which set out the detailed criteria on which prequalification would be based. As noted above, however, Santa Fe's protest to the Navy was not filed until February 11, 1 month after completed prequalification questionnaires were due.

Under our Bid Protest Regulations, when a protest has been filed initially with the contracting agency, a protest to our Office will be considered only if it was timely filed in the first instance with the agency. 4 C.F.R. § 21.2(a)(3) (1985). For purposes of determining the timeliness of a protest to the agency, our regulations provide that a protest based on alleged improprieties apparent on the face of a solicitation must be filed before bid opening or the date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1), (a)(3).

Santa Fe argues that its protest is timely because it was filed before both the period designated in a Navy planning document for appeals to the Navy by bidders seeking prequalification (March 8-29) and the planned bid opening date (May 23). Santa Fe also contends that because the prequalification criteria relate to bidder responsibility, the propriety of the prequalification procedure may be challenged even after bid opening. We disagree with both contentions. As discussed in detail below, we regard the date for submission of the prequalification questionnaire to the Navy as the significant date for determining the timeliness of Santa Fe's protest.

The prequalification procedure used in this case, while not technically a solicitation, is analogous, in our view, to the first-step solicitation of a two-step procurement. Under a two-step procurement, competition under step two is limited to firms which submitted acceptable technical proposals under the step-one request for technical proposals. See Federal Acquisition Regulation subpart 14.5, 48 C.F.R. subpart 14.5. Similarly in this case, the use of a prequalification procedure limits competition under the IFB to firms which have been prequalified.

In the case of a two-step procurement, protests based on alleged improprieties in the step-one solicitation must be filed prior to the step-one closing date. Thus, for example, we have held untimely a protest challenging an agency's decision to conduct a procurement as a small business set-aside filed after the step-one closing date, since the decision to use the set-aside procedure was evident from the step-one solicitation.

RCA Corp. Norman A. Selinger & Associates, Inc., 57 Comp. Gen. 809 (1978), 78-2 CPD ¶ 213; see also Jaybil Industries, Inc., B-188230, Feb. 25, 1977, 77-1 CPD ¶ 143. Similarly here, we believe that, to be timely, Santa Fe's protest should have been filed before the date for submission of completed prequalification questionnaires since the grounds of Santa Fe's protest, the Navy's plan to prequalify bidders and the prequalification criteria, were evident well before that date from the Commerce Business Daily announcement and the prequalification questionnaire.

Our conclusion is consistent with the intent of our timeliness regulations, to allow expeditious consideration of protests without unduly disrupting the government's procurement process. See Ikard Mfg. Co., B-213606.2, May 21, 1984, 84-1 CPD ¶ 533. In this case, if the protest had been filed before the date for submission of the prequalification questionnaire, the Navy would have had an opportunity to change its procurement plan without significant disruption; by filing after that date, Santa Fe allowed the Navy and other potential bidders to proceed with the prequalification process without notice of Santa Fe's objection.

As a result, because the initial protest to the Navy was not filed before the date for submission of the prequalification questionnaire and, therefore, was untimely, Santa Fe's subsequent protest to our Office also is untimely and will not be considered on the merits. See 4 C.F.R. § 21.2(a)(3).

Santa Fe argues that its protest presents an issue significant to the procurement system and, therefore, should be considered on the merits regardless of its timeliness, as provided by section 21.2(c) of our regulations, 4 C.F.R. § 21.2(c). In order to invoke the significant issue exception to our timeliness rules, the subject matter of the protest must not only concern a matter of widespread interest or importance, but must also involve a matter which has not been considered on the merits in previous decisions. See, e.g., Julie Research Laboratories, Inc., B-207745, Nov. 16, 1982, 82-2 CPD ¶ 446. This exception to our timeliness rules is strictly construed and sparingly used to prevent those rules from becoming meaningless.

The protest here does not fall within the exception. We already have considered the issue raised by Santa Fe, the propriety of prequalification procedures, in previous decisions. See Southwest Forms Management Services, 56 Comp. Gen. 953 (1977), 77-2 CPD ¶ 183; METIS Corp., 54 Comp. Gen. 612 (1975), 75-1 CPD ¶ 44; 50 Comp. Gen. 542 (1971). While Santa Fe appears to argue that the use of prequalification in a formally advertised procurement raises a novel issue, we view that issue as merely a corollary to Santa Fe's principal argument that use of prequalification procedures is improper in this case. We believe that the general rules governing whether prequalification procedures in a particular procurement unduly restrict competition and are thus improper are the same whether the procurement involved is advertised or negotiated. See Southwest Forms Management Services, supra.

Finally, in a submission filed with our Office on April 12, Santa Fe for the first time argues that a comparison of the responsibility standards set out in the IFB with the prequalification criteria demonstrates that the prequalification criteria unduly restrict competition.<sup>1/</sup> The responsibility standards referred to are set out in the preaward survey provision in the IFB, which focuses on the bidder's proposed schedule and personnel for the project, rather than the bidder's experience on prior projects called for by the prequalification questionnaire. We find this argument to be without merit.

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<sup>1/</sup> While we regard as untimely the protester's other contentions which relate to the propriety of the prequalification procedure, we view this issue as timely raised. The basis of Santa Fe's argument, the comparison between the prequalification criteria and the IFB, was not evident until the IFB was issued on March 26. The protester's submission raising the issue was filed within 10 days after Santa Fe received the IFB on April 3, as required by our regulations, 4 C.F.R. § 21.2(a)(2).

Santa Fe argues that we have regarded definitive responsibility criteria as unduly restrictive where a bidder which fails to satisfy those criteria nevertheless receives the contract award and is performing responsibly. See Haughton Elevator Division, Reliance Electric Co., 55 Comp. Gen. 1051, 1058 (1976), 76-1 CPD ¶ 294. Relying on that finding, Santa Fe argues that the prequalification criteria here must be regarded as unduly restrictive since a bidder could be found responsible under the IFB, but fail to meet the prequalification criteria. We disagree. First, in Haughton we observed that the fact that a firm which did not meet the responsibility criteria could satisfactorily perform the contract is merely an indication that the criteria may be unduly restrictive. We did not state that satisfactory performance by itself inevitably leads to the conclusion that the criteria are unduly restrictive. In any event, in this case, unlike Haughton, a bidder could not be found responsible by the agency unless it first met the prequalification criteria; the procurement here has been designed so that the prequalification criteria and the responsibility standards are cumulative requirements, all of which must be met before a firm may receive the award. There is no reason for the standards in the IFB to repeat or incorporate the prequalification criteria.

The protest is dismissed in part and denied in part.

Santa Fe requested that it be awarded the costs of pursuing the protest, including attorney's fees. Recovery of costs is allowed only where a protest is found to have merit. 31 U.S.C. § 3554(c)(1), as added by section 2741(a) of the Competition in Contracting Act, Pub. L. No. 98-369, title VII, 98 Stat. 1175, 1199 (1984); Bid Protest Regulations, 4 C.F.R. § 21.6(d). Since we have dismissed the protest in part and denied it in part, we also disallow Santa Fe's request for recovery of costs.

*Harry R. Van Cleve*  
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